No. 211.

In the

Supreme Court of the United States.

October Term, 1920.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY AND THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellants,

VERSUS

B. W. MACKEY, AS THE COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA: THE CITY OF HOLDENVILLE, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

JACOB B. FURRY and
GEO. S. RAMSEY,
Muskogee, Oklahoma,
W. H. HARRIS and
J. W. HARBAUGH,
Toledo, Ohio,
W. T. ANGLIN and
ALFRED STEVENSON,
Holdenville, Oklahoma,
Attorneys for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

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B. W. MACKEY, AS THE COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA; THE CITY OF HOLDENVILLE, *ET AL.*, *Appellees.*

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BRIEF *of* APPELLEES.

Statement of the Case.

It seems to us that the statement of the case in the brief of counsel for appellants is not sufficient to give the court a clear idea of the facts or questions involved, and we beg, therefore, to submit a more comprehensive statement of the issues involved.

On November 1, 1912, appellants, as plaintiffs, filed their bill in the District Court of the United States for the Eastern District of Oklahoma against the appellees, as defendants, to restrain the defendants, and especially B. W. Mackey, as Treasurer of Hughes County, Oklahoma, and all persons acting for, under or with him or in pursuance of his directions or authority, or authority of his office, from making any sale of plaintiffs' property in the City of Holdenville pursuant to certain assessments levied against plaintiffs' property to pay the cost of paving and otherwise improving Oklahoma Avenue in the City of Holdenville, and praying that the title and ownership of plaintiffs in said premises may be quieted as against the pretended lien of said assessments and that said assessments may be cancelled and declared null and void and removed as a cloud upon plaintiffs' title to the property covered by said assessments.

On March 3, 1913, defendants, B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, and the City of Holdenville, filed their separate answer (Rec., p. 32), and on the same day Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, constituting the firm of Spitzer, Rorick & Company, and Madison G. Baldwin, filed their separate answer to plaintiffs' bill (Rec., p. 47).

The bill, after reciting jurisdictional facts, alleges the incorporation on November 28, 1887, under the laws of Minnesota, of the Choctaw, Coal & Rail-

way Company, which was empowered to mine, sell, market and deal in coal, iron and other ore and products thereof, to manufacture coke, charcoal, pig iron and various other metals; to buy, lease, deal in and work mineral lands, and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or development of any mine or quarry owned or operated by it (Rec., p. 3).

That by Act of Congress approved February 18, 1888, the Choctaw, Coal & Railway Company was empowered and authorized to construct and maintain a railway, telegraph and telephone line through what was then Indian Territory, from certain points in said act designated, and to construct and maintain a branch line to the leased coal veins of the Choctaw, Coal & Railway Company in the Choctaw Nation and from thence by some practical route to an intersection with the Atchison, Topeka and Santa Fe Railway Company between Halifax Station and Bear Creek, otherwise known as the North Fork of the Canadian River, all as more fully appears from said Act of Congress and an amendment thereof approved February 13, 1889 (Rec., pp. 3-4).

That pursuant to its charter the Choctaw, Coal & Railway Company proceeded to develop mines upon leases and to construct a railway; that in prosecution of its work it became insolvent and that it became necessary for the United States Government to make some provisions for the work undertaken by

it to be carried on in order that the leased mines might be operated for the benefit of the Indians as wards of the United States and for the purpose of the development of commerce in said territories and among the several states of the Union; that to accomplish said purposes and to secure the operation of said mines for the benefit of the Indians, and in the interests of interstate commerce the United States by an act approved August 24, 1894, empowered the purchasers of the rights-of-way, railroads, mines, coal leasehold estates and other property and franchises of the Choctaw, Coal and Railway Company at any sale made under or pursuant to any decree of court, to form a corporation and vested in said corporation formed all the right, title, interest, property, possession and claim and demand in law and equity in and to the rights-of-way, railroads, mines, coal leasehold estates and property of said Choctaw, Coal & Railway Company, together with all the franchises which had been conferred upon said Company by any and all Acts of Congress, or which it possessed by virtue of its charter; that pursuant to the last-named Acts of Congress there was organized the plaintiff, Choctaw, Oklahoma & Gulf Railroad Company.

That by section 4 of the Act of August 24, 1894, plaintiff, Railroad Company, was authorized to construct and operate branches from its line of railroad and for that purpose to take and use rights-of-way not exceeding 100 feet in width upon making compen-

sation therefor as provided for in the case of taking land for its main line, and to lease its railroads and mines and other property provided that the right to construct branches conferred by said section shall exist and be exercised in the Indian Territory only for the purpose of developing and working the leases mentioned in the Act of Congress of October 1, 1890.

That by Act of Congress approved April 24, 1896, the Government recognized the Choctaw, Oklahoma & Gulf Railroad Company pursuant to the act approved August 24, 1894, and further defined and described the rights, powers and duties thereof, and that by section 2 of said act it was provided that the powers defined by said section 4 shall extend to branches intended to aid the development of any coal or timber territory contiguous or tributary to the lines of the railroad of the said Choctaw, Oklahoma & Gulf Railroad Company, whether owned or controlled by said Railroad Company or by others, said branches not to exceed in length 5 miles, and to the construction and operation of a branch from any point on its existing line of railway to the northern line of the State of Texas, and for this purpose the said Company shall have the like rights, powers and franchises as to the acquisition of the right-of-way and depot grounds, and as to the construction and operation of said branch, and shall be subject to the like conditions and restrictions as it possesses or is subject to, under or by virtue of the provisions of

said Act of August 24, 1894, as to the line of Railroad acquired or constructed thereunder.

That pursuant to said Acts of Congress, plaintiff, Choctaw, Oklahoma & Gulf, became vested with all the rights of the Choctaw, Coal & Railway Company, conferred by Acts of Congress or possessed by it under its charter. That prior to March 24, 1904, said Railway Company acquired by construction and otherwise a line of railway extending from a point on the west bank of the Mississippi River opposite Memphis, Tennessee, by way of Little Rock, Arkansas, to a point at the boundary line between the Territory of Oklahoma and State of Texas at or near Texola, Greer County, Oklahoma. That pursuant to its rights it acquired the right-of-way and station grounds at what is now the City of Holdenville, consisting of a strip of ground 300 feet wide by 3,000 feet long, particularly described in the bill, and a large part of which is now within the corporate limits of the City of Holdenville.

That on March 24, 1904, the Choctaw, Oklahoma & Gulf Railroad Company, being authorized thereto by Congress leased to the Chicago, Rock Island & Pacific Railway Company, all its railway lines and appurtenances including the premises particularly described as its right-of-way and station grounds at Holdenville and its equipment, for a period of 999 years, and that said Chicago, Rock Island and Pacific Railway Company under the terms of said

lease succeeded to all the rights, powers, franchises, etc., of the Choctaw, Oklahoma & Gulf.

That plaintiffs have constructed and now maintain upon the rights-of-way and premises described, railway tracks, both main and sidings, composed of ballast, ties and steel, station houses, freight depots and other appurtenances in constant use in the performance of its charter powers. That its right-of-way and station grounds, or a portion thereof, are contiguous to and abut upon, at the north and east sides thereof, Oklahoma Avenue, a street in the City of Holdenville.

That the City of Holdenville under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved April 17, 1908, and acting by and through its mayor and councilmen, pursuant to said resolutions and ordinances referred to in said bill, levied certain assessments on certain portions of the right-of-way and station grounds of plaintiffs in the City of Holdenville to pay the cost of paving and otherwise improving Oklahoma Avenue. That by virtue of the proceedings had and taken by the mayor and council of the City of Holdenville, a part of the right-of-way and station grounds of the plaintiff which had been assessed for the improvement of Oklahoma Avenue was about to

be sold by the County Treasurer of Hughes County, of which the City of Holdenville is the county seat, for the delinquent assessments which became due and delinquent September 1st, 1911, and September 1st, 1912. That unless restrained and enjoined, the said Mackey as County Treasurer would proceed to sell a part of the right-of-way and station grounds of plaintiff in the City of Holdenville and that by said pretended assessment they sought to segregate a portion of the premises granted to the plaintiff by the Congress of the United States and attach thereto a lien for the payment of such paving and street improvements. That such segregation of a portion of the premises and a consequent lien thereon, if permitted, would be contrary to and destructive of the purposes of said grant by the Congress of the United States and that there is no authority of law therefor.

The bill further averred there was no legal plat of any tract or tracts of land within the City of Holdenville showing any subdivision of plaintiffs' right-of-way and station grounds into blocks or quarter blocks purported to be assessed by the assessing ordinance or which included any blocks designated as 33½, 44½, 52½, 68½, 78½, referred to in the assessment ordinance, and that in truth and in fact no such blocks did exist and that Assessment Ordinance No. 27, puporting to assess portions of said blocks, is wholly void and of no effect.

The bill further alleges that Celian M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B.

Spitzer, partners as Spitzer & Company, and the City of Holdenville, do claim to have an interest in and to all or a portion of the warrants and bonds issued by the City of Holdenville under the terms of said Acts of the Legislature in payment of said paving and street improvements for which said pretended assessment was laid against the property of the plaintiffs (Rec. p. 23).

The answers of the defendants admit practically all of the allegations of the bill; they admit the incorporation and residence of plaintiffs, the various Acts of Congress referred to in plaintiffs' bill, the construction of the railroad, the development of coal mines under leases and transfer of the rights of the Choctaw, Coal and Railway Company to the Choctaw, Oklahoma & Gulf Railroad Company, the execution of a lease by the Choctaw, Oklahoma & Gulf to the Chicago, Rock Island & Pacific, as set forth in complaints' bill; they admit the authority granted by the Acts of Congress referred to and the grant of the right-of-way and station grounds at Holdenville as described in plaintiffs' bill; admit that certain tracts of land, being a part of the plaintiffs' right-of-way and station grounds at Holdenville were assessed for a due proportion of the cost of improving Oklahoma Avenue, and said property in the assessment ordinance, levying said assessments was described as the

North quarter block of block numbered 33½,
The east quarter block of block numbered 33½,

The north quarter block of block numbered 44½,
The east quarter block of block numbered 44½,
The north quarter block of block numbered 52½,
The east quarter block of block numbered 52½,
The east quarter block of block numbered 68½,
The north quarter block of block numbered 68½,
The north quarter block of block numbered 78½,

and that said quarter blocks were assessed in the amounts set forth in plaintiffs' bill and that said tracts of land are and do constitute a part of plaintiffs' right-of-way and station grounds.

Defendants deny that there was no sufficient determination of proper quarter block districts of that portion of plaintiffs' station grounds fronting and abutting upon said improvement for the purpose of appraisement and apportionment of the benefits and assessments of cost in accordance with said appraisement and apportionment as provided in and by said Act of the Legislature of Oklahoma, approved April 17, 1908, and allege the adoption on June 29, 1910, by the mayor and city council of a map or plat subdividing into quarter block districts that portion of the right-of-way and station grounds of plaintiffs assessed and subject to assessment under the laws of Oklahoma (Rec., pp. 37-38).

Defendants further allege that by virtue of the Acts of the Legislature of Oklahoma, it is provided that

> "If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include

such property in proper quarter block districts for the purpose of appraisement and assessment;"

and defendants allege that such portion of plaintiffs' right-of-way and station grounds as abutted upon such improvement throughout the length of 1761 feet thereof was not platted into lots and blocks prior to the time it became necessary to make the appraisement and assessment complained of in plaintiffs' bill, and that the mayor and council of the City of Holdenville prior to said appraisement and assessment, and acting pursuant to said provision of the Act of the Legislature of Oklahoma, did include in proper quarter block districts for the purpose of such appraisement and assessment all that part of said station grounds particularly described as follows, to-wit:

"All that part of said right-of-way and station grounds lying as aforesaid between Oklahoma and Choctaw Avenues in said City and extending from the southeasterly side of the area of intersection of the said right-of-way and station grounds with the right-of-way and station grounds of the St. Louis & San Francisco Railway Company a distance of 1761 feet approximately, in a southeasterly direction between said avenues to the northwesterly boundary line of Gulf Street in said City, as such line is extended in continuation thereof, across said right-of-way and station grounds between said Oklahoma and Choctaw Avenues:"

and that the City did direct and cause the city engineer to plat and map into proper quarter block dis-

tricts such part of said station grounds and did approve and adopt such map; that said map so adopted by the mayor and council did and does show the precise location of each of such quarter block districts and the precise dimensions thereof (Rec., p. 39), and that said map or plat made by the engineer subdividing into quarter block districts that part of plaintiffs' right-of-way and station grounds was adopted by the mayor and council of the City of Holdenville the 29th of June, 1910.

Defendants admit that by the proceedings of the mayor and council of the City of Holdenville it was sought to attach a lien to so much of plaintiffs' said tract of land as is included within said quarter block districts for the payment of the assessments levied under said ordinance against such quarter block districts for the payment of a portion of the costs of such improvement.

Defendants further deny that the reversionary interest in and to said premises is vested in the Government of the United States and allege that the reversionary interest, if any, in and to said land is vested in the Creek Nation or Tribe of Indians from which said lands were taken, and that by section 2 of said Act of Congress approved February 18, 1888, and the amendment thereof approved February 13, 1889, granting to the said Choctaw, Coal & Railway Company the lands constituting its right-of-way and station grounds, it is provided that when any portion of the lands so granted shall cease to be so used such

portion shall revert to the Nation or Tribe of Indians from which the same shall be taken; that said section 2 of said act is in words and figures, as follows:

> "*Sec. 2.* That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of-way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right-of-way, or as much thereof as may be included in said cut or fill: *Provided*, That no more than said addition of land shall be taken for any one station: *Provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken." (Rec., pp. 41-42.)

Defendants further deny that the United States or the nation or tribe of Indians from which the lands were taken is vested with any reversionary interest in and to said lands as against the right of Congress

to impose taxes and liens therefor upon said lands or as against the right of the State of Oklahoma to impose taxes and liens therefor upon said lands, whether for general revenue or for the payment of assessments for local improvements, and deny that the estate vested in plaintiffs in said land is such an estate as is not subject under the law to any assessment on account of paving or street improvement, and deny that there is no authority of law for the assessment so levied and allege on the contrary that by section 5 of the Act of Congress approved February 18, 1888, it was provided that Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes of Indians, to impose such additional taxes upon said railroad as it might deem just and proper for their benefit, and that any territory or state thereafter formed through which said railway shall have been established may exercise the like power as to such part of said railway as may lie within its limits. That said section 5 of said act is in words and figures following:

> "*Sec. 5.* That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this act, for property taken and damages done to individual occupants by the construction of the railway, for each mile of railway that it may construct in said Territory, said payments to be made in installments of five

hundred dollars as each ten miles of road is graded: *Provided*, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this act dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe would be entitled to receive under the foregoing provision. Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum, for each mile of railway it shall construct in said territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: *Provided*, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; *and any territory or state hereafter*

formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act." (Rec., pp. 43-44.)

Defendants for further and separate defense allege that the plaintiffs ought not to be permitted to say that so much of the right-of-way and station grounds as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment upon any or all of the grounds or for any or all of the reasons, complaints and objections set forth in their bill of complaint herein, because these defendants allege the fact to be that such proceedings were had by the mayor and council of said City of Holdenville for the making of said work of improvement, appraisement and apportionment of benefits and costs thereof, as that the mayor and council of said City did upon the return of the report of the board of appraisers showing their appraisement and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including so much of said plaintiffs' right of way and station grounds as was covered and included within said quarter block districts, appoint a time and place for holding a session to hear any complaints or objections that the said plaintiffs

or others might make concerning the appraisement and apportionment aforesaid as to any of such lots or tracts of land, and did give notice of such session and of the time and place of holding the same and did cause the city clerk to have such notice published in a newspaper published and of general circulation in said city, and which session at said time and place and for the purpose of hearing any complaint or objection concerning the appraisement and apportionment of benefits as to any of such lots or tracts of land was duly held by the mayor and council of said City; and notwithstanding the plaintiffs were required to take notice of all that was done by the City of Holdenville, the mayor and council, and officers of said City touching said improvement and assessment, and notwithstanding they had full knowledge of such proceedings and the making of such improvement and that it was intended by said City, mayor and council to assess such part of their said right-of-way and station grounds as did abut upon the said improvement for the payment of a portion of the cost of such improvement and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make complaint or objection concerning said appraisement and apportionment, and did fail to make any complaint or objection to said mayor and council of said City at any time or place concerning said appraisement and apportionment of benefits to so much of their said right-of-way and station

grounds as was included by the said mayor and council in said quarter block districts for the purpose of such appraisement and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said council in relation to the making of said improvement during the progress thereof and of the making of said appraisement and apportionment and of said assessment, and until the filing of their bill of complaint herein; and that they did not within sixty days after the passage by the mayor and council of said City, of the ordinance in their bill of complaint herein mentioned, making such final assessment, bringing any action or suit to set aside such assessment or to enjoin the levying or collecting of said assessment or contesting the validity of said assessment, upon any or all of the grounds or for any or all of the reasons, complaints or objections now in their bill of complaint herein set forth; that said ordinance making said final assessment, was passed by the said city council and approved by the mayor thereof on the 25th day of August, 1910, and that the plaintiffs' bill of complaint herein was not filed and their action herein commenced until, to-wit, the 1st day of November, 1912. That under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved on the 17th day of April,

1908, pursuant to which act the said improvements were made and the said assessments levied, in plaintiffs' bill of complaint complained of, it is among other things provided as in section 7 of said act set forth (a copy of which is here set out for the convenience of the court) in the words and figures following:

> "*Sec. 7.* No suit shall be sustained to set aside any such assessment or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers provided for in section five, unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; *provided*, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment" (Rec., pp. 45-46-47. (See. 728, Appendix.)

The defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, and Madison G. Baldwin, as a further

answer as to them plead that plaintiffs ought not to be permitted to say that so much of the right-of-way and station ground as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment and lien thereof, upon any or all of the grounds or for any and all of the reasons set forth in their bill of complaint herein, because these defendants allege the facts to be that such proceedings were had by the mayor and council of the said City of Holdenville for the making of said work of improvement, appraisement and apportionment of benefits and costs thereof, levying of assessments in accordance with such appraisement and apportionment upon the property therein described, including the plaintiffs' said property, for the payment of the cost of said work of improvement, as that the mayor and council of said City did on the 20th day of October, 1910, adopt a certain resolution, to-wit: Resolution No. 31, "providing for the issuance of street improvement bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma," in the aggregate sum of Eighty-six Thousand, Five Hundred Thirty-two and 5/100 Dollars ($86,532.95); and that said City of Holdenville did issue such series of bonds of the tenor, denomination and number and with the interest coupons thereto attached, in accordance with and as provided

in said resolution; and that for a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company aforesaid, did purchase and acquire one of said bonds with the coupons thereto attached, and ever since have been and now are the owners and holders thereof, to-wit: Bond No. 19 in the sum of One Thousand ($1000.00) Dollars, dated the 9th day of September, 1910, due and payable on the 15th day of September, A. D., 1912, with interest thereon from date thereof at the rate of six per cent per annum, evidenced by Coupons Nos. 1 and 2 thereto attached, which bond with the coupons thereto attached is in the words and figures following, to-wit:

"United States of America, State of Oklahoma, County of Hughes, Number 19 1,000 Dollars

City of Hodenville

STREET IMPROVEMENT BOND

District No. 1.

Know All Men by These Presents, That the City of Holdenville, in the State of Oklahoma, a City of the first class, for value received hereby acknowledges itself indebted to and promises to pay the bearer the sum of

ONE THOUSAND DOLLARS

on the 15th day of September, A. D., 1912, with interest thereon from the date hereof until the principal sum shall be due at the rate of six per cent per annum, payable annually on the 15th day of September of each year, as evidenced by

and upon the surrender of the annexed interest coupons as they severally become due, provided that if this bond shall not be paid at maturity, it shall thereafter bear interest at the rate of ten per cent per annum until paid, and both principal and interest are payable in lawful money of the United States of America at the Fiscal Agency of the State of Oklahoma, in the City of New York.

This bond is one of a series of bonds of like date and tenor issued by the City of Holdenville under authority of and in full compliance with 'An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency', approved April 17, 1908, as amended and in pursuance of resolutions and ordinances of said City duly passed, approved, recorded, authenticated and published, as required by law, for the purpose of procuring the necessary means to pay the cost and expense of improving the following named streets and parts of streets in said City: That portion of Oklahoma Avenue beginning at the intersection of the St. Louis & San Francisco Railroad right of way and the right of way of the Rock Island right of way at the Union Station and extending to the southeast side of Oak Street: That portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street: That portion of Cedar Avenue, beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street: That portion of Creek Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street: That portion of Echo Street

beginning on Oklahoma Avenue and extending to the northeast side of Sixth Street: That portion of Sixth Street beginning on Echo Street and extending to Oak Street: That portion of Seventh Street beginning on Creek Street and extending to Oak Street: That portion of Sixth Street beginning at the southeast side of Oak Street and extending to the northwest side of Gulf Street, constituting Street Improvement District No. 1 of said City and is payable solely from assessments which have been legally levied upon the lots and tracts of land benefited by said improvements, which assessments said City of Holdenville undertakes to collect, as by law provided, and the faith, credit, revenues and property of said City are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained in this bond.

And it is hereby declared and certified that all acts, conditions and things required to be done and to exist precedent to and in making said improvements and levying of said assessments, and the issuing of this series of bonds, have been properly done, happened and performed, and do exist, in regular and due form, time and manner as required by the Constitution and Laws of the State of Oklahoma, and that the total amount of said assessments or any installment thereof, and of the bonds issued on account of said improvements, including this bond, do not exceed any constitutional or statutory limitations.

In Witness Whereof, The City of Holdenville, by its Mayor and Council, has caused this bond to be signed by its Mayor and attested by its clerk and its corporate seal to be hereto af-

fixed and the interest coupons thereto attached to be signed by the fac-simile signature of its Clerk, and this bond to be dated the 9th day of September, 1910.

(Seal of City). F. P. Rutherford, Mayor.

Attest: I. A. Draper, City Clerk

State of Oklahoma, County of Hughes—ss.

I, I. A. Draper, Clerk of the City of Holdenville, in the County and State aforesaid, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that said bond has been duly registered in my office

Witness my hand and official seal this 24th day of October, A. D. 1910. I. A. Draper,

(Seal) Clerk of the City of Holdenville.

No. 19, State of Oklahoma, County of Hughes, City of Holdenville, Street Improvement Bond District No. 1, 1,000 Dollars, Interest 6 Per Cent, Dated September 9, 1910, Due September 15, 1912, Interest Payable September 15 each year, Principal and Interest payable at the Fiscal Agency of the State of Oklahoma in the City of New York, N. Y.

No. 2 September 15, 1912

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk.

No. 1 September 15, 1911.

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk."

And that for a valuable consideration and before the maturity thereof the defendant Madison G. Baldwin, did purchase and acquire one of said bonds with the coupons thereto attached and ever since has been and now is the owner and holder thereof, to-wit: Bond No. 77 in the sum of One Thousand Dollars ($1,000.00) dated September 9, 1910, due and payable, on the 15th day of September, A. D. 1919, with interest thereon from the date thereof at the rate of six per cent per annum, as evidenced by nine coupons to said bond attached, which bond was of precisely the same tenor as the bond hereinabove set out, differing therefrom only in the date of maturity thereof, and in the time of payments of coupons thereto attached.

That neither of said bonds nor any part thereof, nor the interest thereon nor any part thereof, has been paid by the said City of Holdenville from assessments levied for the payment thereof, or at all, except that the interest represented by said Coupons Nos. 1 and 2, has been paid.

And these defendants allege further that they purchased and paid for said bonds in absolute and

full reliance upon the said resolutions and ordinances, map and proceedings, made, passed and approved by the Mayor and Council of the said City of Holdenville, and the record thereof in the journal of their proceedings, and that all acts, conditions and things required to be done and to exist precedent to the making of said improvement, and the making and levying of said assessment, and the issuance of said bonds, had been properly done, happened and performed, and did exist in regular and due form and manner as required by the laws of the State of Oklahoma, as so stipulated upon the face of said bonds and shown by the journal of said proceedings of the said Mayor and Council, and in good faith and absolute and full reliance upon the silence of the plaintiffs in relation to said proceedings and their acquiescence therein, and especially upon their silence and acquiescence in said ordinance levying assessments as aforesaid upon their said property included within said quarter block districts.

That notwithstanding the plaintiffs were required to take notice of all that was done by the Mayor and Council of the City of Holdenville and officers of said City touching said improvement and assessment and the including of their property in quarter block districts for the purpose of appraisement and apportionment of the benefits of such improvement thereto, and for the purpose of assessment thereof for the payment of the cost of such improvement, and notwithstanding they had full knowl-

edge of such proceedings and the making of such improvement and that it was intended by said Mayor and City Council to assess such part of their said right of way and station ground as did abut upon said improvement, for the payment of a portion of the cost of such improvement, and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make such complaint or objection concerning such appraisement and apportionment, and did fail to make any complaint or objection to the Mayor and Council of said City at any time or place concerning said appraisement and apportionment of benefits to so much of their said right of way and station grounds as was included by the said Mayor and Council in said quarter block districts for the purpose of such appraisement and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said Mayor and Council in relation to the making of said improvement during all the progress thereof and of the making of such appraisement and apportionment and of said assessment, until the filing of their bill of complaint herein, and did fail and neglect to take any steps to prevent the making of said assessments upon their said property or to prevent the issuance of said bonds for the payment of the cost of said improvement, but did remain silent and acquiesce therein, receiving the valuable and lasting benefits of said improvement to their said property, well knowing the

said series of bonds, including the said bonds so pur
chased and now owned by these defendants, were
payable solely out of the moneys to be raised by
assessment against the property benefited thereby

That these defendants purchased and paid for
said bonds as aforesaid without any notice, knowl
edge or information that the plaintiffs had any ob
jection to the assessment of their said property for
the payment of the cost of said improvement.

That by reason of the premises the said plain
tiffs are forever estopped and precluded from mak
ing said objection and objections in their bill of com
plaint herein set forth concerning said final assess
ment of their said property, and the lien of said as
sessment thereon, and from contesting the validity
thereof, upon any of the grounds or for any of the
reasons in their bill of complaint herein set forth
(Rec., pp. 63-68.)

The EVIDENCE.

A stipulation as to the facts was signed and filed, and, omitting therefrom the exhibits, is as follows: (Rec., p. 68.)

STIPULATION.

"For the purpose of this cause it is hereby admitted, stipulated and agreed by and between the complainants and the defendants herein, that:

"*1.* That the tract of land 300 feet in width and 3,000 feet in length, specifically described in the Bill of Complaint herein, and therein alleged to constitute complainants' right-of-way and station grounds, extends in a northwesterly and southeasterly direction, and the larger portion thereof lies between Oklahoma and Choctaw Avenues, which are avenues within the corporate limits of the said City of Holdenville; and that such portion of said tract constitutes the railway right-of-way, yards and station grounds of the complainants. Oklahoma Avenue in said city runs parallel and is contiguous to the lands constituting said right-of-way and station grounds along the northeasterly side thereof and said avenue and station grounds have a common boundary line between them. Choctaw Avenue in said city runs parallel and is contiguous to said tract constituting said station grounds along the southwesterly side thereof, and said avenue and station grounds have a common boundary line between them. The said tract of land constituting said station grounds is 300 feet in width and occupies all the space between

said Oklahoma Avenue on the northeast side thereof and Choctaw Avenue on the southwest side thereof.

"2. The right-of-way of the St. Louis and San Francisco Railroad Company extends in a northeasterly and southwesterly direction and intersects the right-of-way and said station grounds of the complainants, which runs as aforesaid in a northwesterly and southeasterly direction, and so much of said Oklahoma Avenue, for the improvement of which the assessment was made of which complainants complain, and which was improved as alleged, is 1,461 feet in length, extending from the point of intersection of the northeasterly boundary line of the said station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the said St. Louis and San Francisco Railroad Company, in a southeasterly direction along the said station grounds of the complainants.

"3. The surface improvement of said Oklahoma Avenue, throughout the said 1,461 feet, extends outward a distance of 30 feet from the northeasterly boundary line of said station grounds, and consists of the grading, paving, curbing, guttering and draining of the same.

"4. That the said town of Holdenville was incorporated as a municipal corporation and its territory defined by legal subdivisions according to the Government survey, on the 14th day of November, 1898, and such legal subdivisions constituting the territory of the said incorporated town of Holdenville were:

'The Southeast Quarter of the Southeast Quarter of Section Twelve (12), in

Township Seven (7), North of Range Eight (8), East of the Indian Meridian;

'The East Half of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section Thirteen (13), in Township Seven (7) North, of Range Eight (8) East of said Meridian:

'The South Half of the Southwest Quarter, and the Southwest Quarter of the Southeast Quarter of Section Seven (7), in Township Seven (7) North of Range Nine (9) East of said Meridian;

'The West Half of the Northeast Quarter, and the Northwest Quarter of the Southeast Quarter, the North Half of the Southwest Quarter, and the Northwest Quarter, of Section Eighteen (18), in Township Seven (7) North, of Range Nine (9) East of said Meridian;'

constituting a tract of land one mile square, according to that Government subdivision.

"That the Secretary of the Interior, under and by virtue of the terms of the Original Creek Agreement, caused to be surveyed, staked and platted, the said town of Holdenville, and did on the 27th day of November, 1901, approve a plat of such survey, a copy of which plat with all the endorsements thereon, is hereto attached, marked 'Exhibit A' and made a part of this stipulation.

"That that tract of land 300 feet in width and 3,000 feet in length and specifically described in the bill of complaint herein, and herein alleged to constitute complainants' right-of-way and station grounds, did constitute a part of the territory within the corporate limits of

the said town of Holdenville as so defined on the 14th day of November, 1898, and ever since has been and is now within the corporate limits of said town, and its location, relative to the blocks and streets of said town is correctly delineated and shown on said map, a copy of which, marked 'Exhibit A,' is hereto attached as aforesaid.

"4. That in the proceedings of the Mayor and Council herein mentioned, for the improvement of certain streets and avenues in the said City of Holdenville, and the assessments of lots and blocks in said city for the payment of the cost of such improvement, the references therein contained to streets and avenues, and to lots and blocks other than those comprising said right-of-way and station grounds of the complainants, are the same streets and avenues, lots and blocks, named and numbered, and located precisely the same as shown on said map marked 'Exhibit A' as aforesaid; and as to the territory covered by said map marked 'Exhibit A,' it did, at the time of the proceedings by the Mayor and Council herein mentioned for the improvement of certain streets and avenues in said city, and does now constitute the official map of said City of Holdenville.

"5. That wagon crossings over said right-of-way and station grounds of complainants have been installed and maintained for public use for several years on the line of said Echo, Cedar and Oak Sts., as shown on the map hereto attached and marked 'Exhibit A'; and that on the north side of said Oak Street crossing, a concrete sidewalk has been laid across the right-of-way and station grounds for public use, and on one other of the said three street crossings prep-

aration by grading has been made on both sides of such crossing to put in sidewalks for public use. Said Creek Street is not open to travel across said station grounds.

"6. So much of said tract of land constituting the right-of-way, station grounds and railway yards of the complainants as abuts as aforesaid on said Oklahoma Avenue throughout the said length of 1,461 feet thereof, has constructed thereon the complainants' main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all in use, and the said Echo, Creek, Cedar and Oak Streets, and Oklahoma Avenue, are the principal thoroughfares leading from the business center of said city, and from surrounding country to the said main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all of which said improvements, except passing tracks,' are located on that portion of said right-of-way and station grounds on the northeast side of the center line thereof Very much the larger portion of the freight and passenger business done in said City of Holdenville by the complainaints is derived from passenger and freight traffic conveyed to and from said station grounds and railway yards over said Oklahoma Avenue, Echo, Creek, Cedar and Oak Streets, and over the improvements on said avenue and streets, for the payment of which the assessments were levied of which complainants complain. That a copy of a plat showing the tracks and other structures and location thereof upon said station grounds and railway yards of complainants abutting on

said Oklahoma Avenue, is hereto attached, marked 'Exhibit B,' and made a part of this stipulation.

"7. That the elevator, storage houses, oil warehouse and coal bins shown by said plat rest upon sites used under permits by complainants to persons and companies for use in handling commodities transported over the complainants' lines, and said persons and companies so using said sites also transact thereon a local business in such commodities with others than the complainants; that said permits are subject to termination on thirty days' notice by either party. And one of complainants' railway tracks on said station grounds and railway yards is constructed along the northeast side of such grounds and yards and in such proximity to that part of Oklahoma Avenue improved as herein shown for the distance of 800 feet in length, as that the one side of the freight car, or cars, standing on any part of such track throughout the said 800 feet, is flush with the edge of said avenue and improvement, so that in loading complainants' freight cars with certain freights for transportation, and in unloading certain freights therefrom, wagons delivering and receiving such freights stand upon the improved portion of such avenue while unloading therefrom into said cars and while loading such wagons out of such cars, and have made such use of said avenue and improvement ever since said improvements were made.

"8. Under and by virtue of the Act of the Legislature of the State of Oklahoma, mentioned in complainants' bill of complaint herein, it is provided, among other things, that,

'If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided.'

"9. That portion of complainants' right-of-way, railway yards and station grounds abutting as aforesaid on said Oklahoma Avenue throughout the length thereof, from the point of intersection of the northeasterly boundary line of said right-of-way and station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the St. Louis and San Francisco Railroad Company, and lying between said Oklahoma and Choctaw Avenues, had not been platted into lots and blocks, and the Mayor and Council of said City of Holdenville on June 29, 1910, by motion, adopted a map, a copy of which is hereto attached, marked 'Exhibit C.' That the minutes of said City Council with reference to said map are as follows:

'City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

'Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

'Upon a vote of "aye" and "nay" by roll call the following vote was recorded. Those voting "aye," Adams, Bailey, Hyde,

Pickens, Reese, Taylor. Those voting "nay," none. Absent, Cornish, Nix.

'Motion declared carried and map adopted.'

"That on the original of said map the lines, showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered 33½, 44½, 52½, 68½, 78½, and the dollar signs followed by figures appearing therein, are in pencil, and attached thereto are certain affidavits and endorsements, copies of which are attached to said exhibit: that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the City of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of sub-dividing said right-of-way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements.

"*10.* Inasmuch as said Oklahoma Avenue extends in a southeasterly and northwesterly direction along the front of said blocks 33½, 44½, 52½, 68½ and 78½, and the exterior lines of said quarter-block districts as shown by said map are on two of the opposite sides thereof parallel to said Oklahoma Avenue, and on the other two opposite sides thereof are at right angles to said Oklahoma Avenue, such quarter-block districts were, under said appraisement and apportionment, and in the said ordinance levying said assessments, described with refer-

ence to the cardinal points of the compass, that is to say, the most northerly quarter-block of each of said blocks was given the designation of 'North ¼ Block of Block.....' (the number being inserted) and the most easterly quarter-block of each of said blocks was given the designation of 'East ¼ Block of Block.....' (the number being inserted).

"*11.* On June 1, 1910, an agent of complainants interviewed the City Clerk of Holdenville, one Draper, and on said date examined the records of the proceedings of said Council respecting the improvement of Oklahoma Avenue in said city; that said proceedings disclosed no plat or record thereof dividing complainants' said property into lots and blocks for any purpose, nor any appraisement nor assessment thereof.

"*12.* After said map marked 'Exhibit C' herein had been approved and adopted by the City Council of the City of Holdenville, as hereinbefore set forth, and the said ordinance had been passed, levying the assessments of which the complainants complain, the said original map was included in a transcript of the proceedings of the Mayor and Council of said City of Holdenville touching the work of improvements of said Oklahoma Avenue and other streets, and delivered to the contractor performing the work and by him forwarded to Spitzer, Rorick & Company of Toledo, Ohio, they being the purchasers of the bonds issued by the City to procure the funds to construct said improvements, and who, upon discovering that said map so held by them was the original map, between January 23, 1913, and March 7, 1913, returned the said map to the City Clerk with the affidavits

and endorsements of McIntosh Barber Company attached thereto as shown by said Exhibit C hereto.

"*13.* After the said return of said map to the City Clerk of said City, which return took place after the commencement of this action, the Mayor and Council of said City did adopt a resolution, a copy of which is hereto attached marked 'Exhibit D'.

"*14.* That there is no plat or record except the plat, a copy of which is attached hereto as 'Exhibit C,' and the record of the proceedings of the Mayor and Council adopting such plat, as aforesaid, which shows any subdivision of complainants' said property into blocks numbered 33½, 44½, 52½, 68½ and 78½.

"*15.* Such proceedings were held by the Mayor and Council of the City of Holdenville, touching the making of said work of improvement upon Oklahoma Avenue in said City, the cost thereof, the appraisement and apportionment of benefits conferred upon abutting property, as that the Mayor and Council of said City did, upon the return of the report of the Board of Appraisers showing the appraisement and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including said 'North ¼ block of Block 78½, East ¼ block of Block 68½, North ¼ block of Block 68½, East ¼ block of Block 52½, North ¼ block of Block 52½, East ¼ block of 44½, North ¼ block of Block 44½, East ¼ block of 33½, North ¼ block of Block 33½,' appoint a time and place for holding a session to hear any complaints or objections that the said complainants or others might make concerning the said

appraisement and apportionment aforesaid as to any such lots and tracts of land, and did give due notice of such session and of the time and place of holding the same, by causing the City Clerk of such City to have such notice published in a newspaper published and of general circulation in said City, and the Mayor and Council of said City did duly hold such session at the time and place so appointed and noticed, and did there and then, to-wit, on the 29th day of July, 1910, by resolution, confirm said report of such appraisement and apportionment as revised and corrected by them.

"*16.* The complainants and each of them did fail to appear at such session to make complaint or objection against such appraisement and apportionment, and did fail and neglect to make complaint or objection to said Mayor and Council at any time against such appraisement and apportionment of benefits to so much of their said tract of land constituting their said right-of-way and station grounds as was included as aforesaid in said quarter-block districts.

"*17.* Complainants did not, or did either of them, within sixty days after the passage by the Mayor and Council of said City of Holdenville of the ordinance in their bill of complaint herein mentioned, making the assessments of which they complain, a copy of which insofar as the assessments involved in this action are concerned is as alleged in the bill of complaint herein, bring any action or suit to set aside such assessment or to enjoin the levying or collecting of such assessment, or contesting the validity thereof upon any or all of the grounds or for any or all of the reasons, complaints or objections now in

their bill of complaint herein set forth. Said ordinance making said final assessment was passed by the said City Council and approved by the Mayor thereof on the 25th day of August, 1910, and published on the third day of September, 1910, and the complainants' bill of complaint herein was not filed and their action herein commenced until, to wit, the 1st day of November, 1912.

"*18.* The complainants had full knowledge of the commencement, and of the progress and completion of said work of improvement of and along said Oklahoma Avenue.

"*19.* The Mayor and Council of the City of Holdenville did on the 20th day of October, 1910, adopt a certain resolution, to-wit:

'Resolution No. 31.

'Providing for the issuance of street improvement bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma.'

in the aggregate amount of Eighty-six Thousand, Five Hundred Thirty-two and 05/100 Dollars ($86,532.05); and did issue such series of bonds of the tenor, denomination and numbers and with the interest coupons hereto attached, in accordance with and as provided in said resolution, except that Bond No. 29 for $650.00 and Bond No. 55 for $1,000.00 and Bond No. 56 for $650.00 and Bond No. 65 for $650.00, were not issued but cancelled, a copy of which resolution is hereto attached, marked 'Exhibit E.' and made a part of this stipulation.

"20. For a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, did purchase and acquire all said series of bonds so issued, and were at the commencement of this action the owners and holders and are now the owners and holders of one of said series of bonds with the coupons thereto attached, to-wit, Bond No. 19 in the sum of $1,000.00 dated the 9th day of September, 1910, due and payable on the 15th day of September, 1912, with interest from date thereof at the rate of six per cent per annum, evidenced by coupons numbered 1 and 2 thereto attached.

"21. For a valuable consideration and before maturity thereof the defendant, Madison G. Baldwin, did purchase and acquire and is now the owner and holder of one of said series of bonds with the coupons thereto attached, to-wit, bond No. 77 in the sum of $1,000.00, dated September 9, 1910, due and payable on the 15th day of September, 1919, with interest from date thereof at the rate of six per cent per annum, evidenced by nine coupons numbered 1 to 9 both inclusive to said bond attached.

"22. Neither of said bonds numbered respectively 19 and 77, nor any part of the principal thereof, or the interest thereon or any part thereof, has been paid, except that the interest represented by said coupons numbered 1 and 2 on each of said bonds has been paid.

"23. The defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, and Madison G. Baldwin, purchased and paid for said bonds num-

bered 19 and 77 in reliance upon the resolution, orders, ordinances, maps and proceedings, made, passed and approved by the Mayor and Council of the said City of Holdenville, and the record thereof as the same appears upon the record of their proceedings, and they relied upon the recitals appearing on the face of said bonds.

"*24.* That on the 16th day of September, 1912, the City Clerk of said City of Holdenville made a certificate to the County Treasurer of Hughes County, Oklahoma, a copy of which in so far as the assessment involved in this action is concerned, is hereto attached and marked 'Exhibit F' and made a part hereof. And thereafter the said County Treasurer placed said described property on the delinquent tax list for the current year and advertised the same for sale in the amount of said installment of said assessment as shown by said certificate and penalties provided by law; that the description of the property involved in this action was in said advertisement the same as that shown by said certificate of said City Clerk.

"*25.* That on March 24, 1904, the said Choctaw, Oklahoma & Gulf Railroad Company leased to The Chicago, Rock Island & Pacific Railway Company all its railway lines and appurtenances thereto, including the premises particularly described in the bill of complaint herein, a copy of which said lease is hereto attached, marked 'Exhibit G' and made a part hereof.

"*26.* That a certain exhibit marked 'A,' attached to and made a part of the report of the appraisers mentioned in the bill of complaint, shows the description of each lot, piece or parcel of land and the amount appraised and appor-

tioned against each such lot, piece or parcel of land, and all that portion of such exhibit 'A' which gives a list of the lots, pieces and parcels of land fronting or abutting upon said Oklahoma Avenue and the amount of the appraisement and apportionment opposite such lot, piece or parcel of land as confirmed by the Mayor and Council is in the words and figures of the exhibit hereto attached, marked 'Exhibit H' and made a part of this stipulation, and is a true and correct statement of so much of said report.

"*27.* That section 1 of the assessing ordinance mentioned in the pleadings herein, omitting all those lots, pieces and parcels of land not fronting or abutting upon said Oklahoma Avenue and the amounts of the assessments against the same, is in the words and figures shown by 'Exhibit I' hereto attached and made a part of this stipulation.

"*28.* That the said right-of-way and station grounds, hereinbefore particularly described, are a part of the lands granted by the Congress of the United States for the purposes and as alleged in the bill of complaint herein and together with the said tracks and facilities located thereon, were at the time of the proceedings by said City Council and for a long time theretofore and ever since have been used as a part of said railway in the conduct of business as a common carrier of both interstate and intrastate commerce, and that a portion of the main track of said railway is upon the property sought to be subjected to the payment of assessments involved in this action.

"*29.* It is agreed that this cause be submitted upon the bill, answers and this stipula-

tion of facts, and such other competent, relevant and material evidence as the parties, or either of them, shall offer not inconsistent therewith.

C. O. Blake,

.....

Attorneys for Complainants.

J. B. Furry & E. C. Motter,

Attorneys for Defendants."

There was some oral testimony, the substance of which on behalf of plaintiffs was to the effect that J. G. Gamble, as attorney for the Rock Island, went to Holdenville during 1911 or 1912, and made an investigation with reference to the paving of Oklahoma Avenue, and that he found on the minutes of the proceedings of the City Council under date of June 29, 1910, record of a motion concerning the adoption of a certain plat. That he could not find the plat in any of the City offices and on inquiry was informed that neither the Mayor nor City Clerk nor City Engineer knew where the plat was. He was told by Mr. Draper, the City Clerk, that there was a plat; where or what it contained, he did not remember. The plat was not recorded in the office of the Register of Deeds nor in any other office so far as he could learn (Rec., p. 98). Several witnesses testified on behalf of the defendants; most of their testimony is covered by the facts included in the stipulation, but is to the effect that during the progress of the proceedings relating to these improvements of 1910, one or more officers of the Rock Island Railway called

on the City officials at different times, first on June 1st, 1910, and secured a copy of the resolutions and other proceedings relating to the improvement of this street had up to that time from the city clerk; they further testified as to the adoption of a plat on June 29, 1910, subdividing a porion of the railway company's right-of-way and station grounds into quarter blocks for assessment purposes, and that this map which had been prepared by the City Engineer was in the City Clerk's office for some months thereafter and that an enlarged copy of this map was tacked up on the wall in the office of the City Engineer, and that these maps were at all times open to inspection of any person who might inquire; that this map subdividing the Railway Company's property, together with a map of the City of Holdenville and the resolution appointing appraisers describing the property to be appraised, was delivered to the Boad of Appraisers appointed by the City and used by them in the appraisement of the benefits and apportioning the costs of the improvements to the various lots and tracts of land in the Improvement District.

There is really no dispute as to any substantial fact with reference to these proceedings or with reference to the issues in contoversy. The City Clerk testifies (p. 104) that he went over this map in the City Engineer's office with a representative of the Rock Island Road and showed him this paving district several times. Again just after the passing of

the assessment ordinance the City Clerk testified that a representative of the Company came to his house; he went with him to the printer's office and got a paper containing a copy of the assessment ordinance and then went to Mr. Rutherford's store (Mr. Rutherford was Mayor), and talked there with the Mayor, Mr. Rutherford, in regard to the matter. They had a copy of the assessment ordinance before them at the time. (Rec., pp. 98-109.)

We think this testimony is important mainly to show that the plaintiffs had full knowledge and notice of all the proceedings and the various steps had and taken with reference to these improvements during their progress and it is not disputed that they took no steps whatever to stop the proceedings, to protect the contractor or the bond buyers, until more than two years after the improvements were completed.

The case was submitted to the trial court on June 23rd, 1916, and decided in January, 1918. (Rec., p. 109.)

The trial court granted an injunction and on appeal from that decree to the Circuit Court of Appeals of the Eighth Circuit, the decree of the District Court was reversed and the cause remanded with directions to dismiss the bill. (Rec., p. 124.)

ARGUMENT.

The specifications of error relied on by counsel for appellants, as set forth on page 12 of their brief, are as follows:

1. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the tract or parcel of complainants' right-of-way and station grounds, described in the bill of complaint, or petition, was not, under the Constitution and laws of the United States, exempt from its pretended assessment and from segregation and sale thereunder separate from the railway franchise.

2. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the complainants' easement of right-of-way and station grounds sought to be assessed and sold was sufficiently identified in the proceedings therefor to afford due process of law, and that the enforcement of the pretended assessment was not, for that reason, repugnant to the Fourteenth Amendment to the United States Constitution.

3. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the state laws authorizing assessments for local improvement and sale for non-payment, authorize special assessments against, and the sale of, the easement of right-of-way and station grounds described in the bill of complaint.

Before proceeding further, we desire to suggest that the constitutional questions referred to in ap-

pellants' specifications of error are now raised for the first time.

A careful examination of appellants' bill fails to disclose any objections to the assessments complained of on constitutional grounds.

An examination of the opinion of the District Judge, fails to disclose a decision or discussion of any constitutional question, unless by inference he had in mind that clause of section 8, article 1, which gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The same is true with reference to the opinion of the Circuit Court of Appeals. (Rec., p. 121.) The question of due process of law or of the equal protection of the laws, provided for by the Fourteenth Amendment to the Constitution is no where discussed in the entire record. The only reference to the matter we find is in the opinion of Circuit Judge Hook in the following language:

> "The general rule, sustained by the weight of authority, is that a railroad right-of-way, whether owned in fee or held in easement, is real estate, property, or ground, which may be subjected to assessment for the cost of local improvements."

(See *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned in 197 U. S. 430. (Rec., p. 122.)

We respectfully submit, therefore, that the questions now raised for the first time in this cause should not be considered by this court.

Before taking up the questions argued in appellants' brief, we call the court's attention to other matters shown by the record which, in our opinion, should prevent the appellants from obtaining the relief sought.

The assessment ordinance complained of was passed and approved August 25, 1910, and published September 3, 1910, while complainants' bill was not filed until November 1st, 1912 (Rec., p. 75, finding 17).

Complainants admit that they had full knowledge of the commencement and of the progress and completion of said work of improvement (Rec., p. 75, finding 18).

Complainants admit that notwithstanding they had full knowledge of the commencement and of the progress and completion of this improvement, they took no step towards bringing any suit to set aside the assessment or to enjoin the levying or collection of the same, or to contest the validity upon any grounds or for any purpose, or to in any way stop the proceedings and prevent the assessments against their property during the progress of the work, but waited until the contractor had expended his money, and the defendants herein, Spitzer, Rorick & Company and Madison G. Baldwin, and the City, had advanced their money in good faith and issued and

purchased the bonds in reliance upon the proceedings had and taken by the Mayor and City Council.

No Objections Are Made to the Regularity of the Proceedings by the City of Holdenville.

It is to be noted that the bill raises no question as to the sufficiency or regularity of the proceedings by the City of Holdenville, or of any of its officers, in relation to the improvements referred to, and the assessments complained of, with one exception. The single exception being, that no sufficient plat was made or filed or recorded, and no sufficient subdivision into the quarter block districts was made by the City of Holdenville, of that part of the complainants' property assessed for its proper proportion of the costs of the improvements, as set forth in the 16th and 17th paragraphs of the bill.

With the single exception noted, therefore, the court must take it for granted that all the proceedings had and taken by the City of Holdenville in regard to the improvement of Oklahoma Avenue and the assessment levied to pay the costs thereof, are regular and in all respects in conformity to the provisions of the Act of the Oklahoma Legislature approved April 17, 1908, as amended (in a matter immaterial so far as this case is concerned) March 23, 1909.

The Oklahoma Statute under which these improvements were made is found in Session Laws 1907-8, pages 166 to 177, and this act with the amend-

ment of section 3 made in 1909 is found in Snyder's Compiled Laws of 1909, page 329, being sections 722 to 733, inclusive.

For the court's convenience we have had sections 722 to 728 inclusive of the Compiled Laws of Oklahoma, 1909, being all the paving law in force at the time of the proceedings in this case, applicable thereto, copied in the Appendix to this brief.

No Complaint That Assessments Are Unjust or Inequitable, Nor That Complainants Have Not Received Benefits Equal to the Assessments Levied.

It must be further noted that the bill makes no complaint that the assessments levied and sought to be collected are unjust, inequitable or in excess of the benefits received by complainants by reason of the improvements made, or out of proportion to the assessments levied on other property in the district. On the contrary, complainants' bill affirmatively shows, as recited in the report of the appraisers set forth in the bill, that the appraisers within five days after being notified of their appointment proceeded

> "To appraise and apportion to said several lots and tracts of land, the benefits resulting thereto on account of making said improvements. That in making said appraisement and apportionment, we first apportioned to each quarter block its due proportionate charge according to the amount and of work performed upon the abutting streets and other public places, includ-

> ing street intersections and alley crossings, which respective amounts appraised, apportioned and adopted, we find just, equitable and accurate, and that the several respective quarter blocks are benefitted to the extent of the respective amounts so apportioned." (Rec., p. 13.)

As the proceedings, therefore, show on their face the property assessed was benefitted to the extent of the assessment, and that the costs of the improvement was apportioned to the several lots and tracts of land in the improvement district in proportion to the benefits received, as the law requires shall be done, the bill must be taken as showing affirmatively on its face that complainants have received full benefit to the extent of the assessments at least, because of the improvements made.

Jurisdiction or Authority of the City to Levy Assessments Not Questioned.

It must be further noted that the bill raises no question of the jurisdiction or authority of cities of the first class in Oklahoma to levy special assessments for street improvements. The Act of April 17, 1908, above referred to, section 1 (Sec. 722, Appendix), grants to cities of the first class full and plenary authority to

> "establish and change the grade of any streets, avenues, lanes, alleys, and other public places in such cities, and to permanently improve the same by paving, macadamizing, curbing, guttering and drainin.g the same, including the install-

ing of all manholes, catch basins, and necessary drainage pipes, whenever in their judgment the public convenience may require such improvements, subject only to the limitations prescribed in this act."

Section 1 of this act (Sec. 722, Appendix) further provides:

"That when a steam railway company shall occupy any portion of a street with its tracks running in the general direction of such street, either on or adjacent thereto, that the said steam railway company shall improve the space between its said tracks, and two feet on either side thereof in the same manner that said streets shall be improved, and the same as is hereby required of street railway companies, and in case any steam railroad or street railway company shall occupy an alley with its track or tracks, such company shall be required to improve, gutter, drain, grade or pave such alley in the manner that may be required by the ordinance of such city, and where any railroad company shall cross with any street that is being, or has been paved, the City Council may require such railroad company to pave so much of said street as may be occupied by its track or tracks, and two feet on each side, and when more than one track crosses such street within a distance of 100 feet said railroad company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same manner as the city may be improving, or has improved, the other portion of said street, and that the city may require, in addition to the improvement of such street as herein required, that said railroad company shall construct sidewalks with

such material as the city may by ordinance require upon either or both sides of such streets, etc."

The provisions of our paving law, as applied to street and steam railroads, have been before the Supeme Court of Oklahoma in

Oklahoma City v. *Shields*, 22 Okla. 265, 100 Pac. 559;
M., K. & T. Railway Co. v. *City of Tulsa*, 45 Okla. 382, 145 Pac. 398;
Oklahoma Railway Co. v. *Severns Paving Co.*, (Okla.) 170 Pac. 216-220, 251 U. S. 104;
Oklahoma City v. *Orthevein*, 258 Fed. 190.

It must be noted that the portion of our paving law above quoted is made to apply

"When a steam railway company shall occupy any portion of a street with its tracks running in a general direction of such street, either on or adjacent thereto."

and also,

"where any railroad company shall cross with any street that is being or has been paved."

In this case the property of complainants does not occupy any portion of the street improved, as shown by the map offered in evidence (Rec., pp. 78-79, Exhibit "C"). The right-of-way and station grounds run parallel with Oklahoma Avenue, and front or abut on Oklahoma Avenue.

Section 3 of the Act of April 17, 1908 (Sec. 724, Appendix), provides as follows:

"The lots, pieces or parcels of land fronting and abutting upon any such improvement, shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which such block abuts, together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which costs shall be apportioned among the lots and subdivisions of such quarter block, according to the benefits to be assessed to each lot or parcel as hereinafter provided. * * * If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block district for the purpose of appraisement and assessment as herein provided."

The bill (Rec., p. 2) alleges that the defendant, The City of Holdenville, is a municipal corporation of the first class, organized and existing under the laws of the State of Oklahoma, and is located in Hughes County, Oklahoma. This allegation is admitted by the defendants, and there is no question, therefore, that the City of Holdenville did not have all the powers granted by the laws of Oklahoma to cities of the first class.

Legal Objections to Assessments.

As we construe complainants' bill, but three objections are made to the legality of the assessment, which may be briefly summarized as follows:

First. That complainants, by virtue of certain Acts of Congress referred to in the bill and of the powers and authorities thereby granted to complainants, and the Choctaw Coal & Railroad Company, of which company complainants claim to be the successor, are agencies or instrumentalities of the federal government in the execution and exercise of its governmental powers in carrying on commerce with the Indian nations and tribes, and in the regulation of commerce between the states, and in the exercise of the duties of the federal government as guardian of the Indian tribes and nations through which these companies were empowered to construct and operate a railroad, and that by reason of being such governmental agency or instrumentality, complainants, as well as their property, are exempt from liability for the special assessments complained of.

Second. That if complainants' property were permitted to be sold for the non-payment of the taxes complained of, it would segregate a portion of complainants' right-of-way and station grounds, and attach a lien thereto, and that such segregation of a portion of the property would be contrary to and destructive of the purpose of the grant of Congress to complainants and would interfere with complain-

ants carrying out the objects and purposes of Congress as set forth in the acts referred to.

Third. That there was no legal plat or subdivision of complainants' property made or recorded, subdividing complainants' property into blocks or quarter block districts by which the particular portion of complainants' property which might be sold by virtue of the lien of the assessments, could be definitely ascertained and determined.

The opinion of the trial judge (Rec., pp. 110-111) is based apparently on the first and second objections noted and no reference is made to the third.

FIRST PROPOSITION.

Complainants' property is not exempt from taxation or assessment by local authorities because complainants may, to some extent, be a federal agency and engaged in carrying out certain policies and purposes on behalf of the Government.

It would be useless to attempt to review or even refer to all the decisions of the courts of last resort on this question. This is a tax levied upon a specific piece of property belonging to the complainants, or in which the complainants have an interest, and not a tax on complainants' right to do business or on their franchise.

The distinction contended for is clearly set forth in many decisions of the Supreme Court. It is clearly expressed in *Railroad Company* v. *Peniston*, 18

Wallace 5. The Union Pacific Railroad Company, chartered by Act of Congress, July 1, 1862, under an act entitled: "An Act to aid in the construction of a railroad and telegraph line from the Mississippi River to the Pacific Ocean, and to secure the Government the use of the same for postal, military and other purposes," claimed exemption from taxes assessed by the State of Nebraska on the ground that the railroad company was a federal agency, by virtue of its charter and the purposes and objects sought to be attained pursuant to the powers granted by Congress to the corporation. Paragraph One of the syllabus in that case is as follows:

> "The exemption of agencies of the federal government from taxation by the states, is dependent not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states. A tax upon their operations being a direct obstruction to the exercise of federal powers, may not be."

Paragraph 2 of the syllabus is as follows:

> "This doctrine applies to the case of a tax by a state upon the real and personal property,

as distinguished from its franchise, of the Union Pacific Railroad Company, a corporation chartered by Congress for private gain, and all whose stock was owned by individuals, but which Congress assisted by donations and loans, of whose board of directors the government appoints two, which makes annual reports to the government, whose operations in laying, constructing, and working its railroad and telegraph lines, as well as its rates of toll, are subject to regulations imposed by its charter, and to such further regulations as Congress may hereafter make; on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, Congress may assume the control and management, thereof, and devote the income to the use of the United States; the loan of the United States to which, amounting to many millions, is a lien on all the property, and on failure to redeem which loan, the Secretary of the Treasury is authorized to take possession of the road with all its rights, functions, immunities, and appurtenances, for the use and benefit of the United States; and, finally, where all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government shall have the preference at rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to which control, and the obli-

gations and liabilities of the company, Congress, not forbidding a state tax, reserves the right to add to, alter, amend, or repeal the charter."

In the opinion of the above case, on page 37, the court says:

> "In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* v. *Union Pacific*. It is not imposed upon the franchises or the right of the company to exercise and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of the United States mail, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is in interference with the exercise of any powers belonging to the general government, and if it is not, it is prohibited by no constitutional implication."

To the same effect is *Thompson* v. *Union Pacific Railway Company*, 9 Wallace 579.

To the same effect is *Central Pacific Railroad Company* v. *California*, 162 U. S. 91. Chief Justice FULLER in this case refers to and reaffirms the rule laid down in *Railroad Company* v. *Peniston*, 18 Wallace 5, and *Thompson* v. *Union Pacific*, 9 Wallace 579, and quotes the following (p. 119) from *Railroad Company* v. *Peniston, supra:*

"It cannot be that a state tax which remotely affects the efficient exercise of a federal power, is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons, or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which the federal tax may be laid. The states are, and they must ever be co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

The doctrine in *Railroad Company* v. *Peniston* was referred to with approval in *Western Union Telegraph Company* v. *Moss*, 125 U. S. 530, and in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413-416. *Thomas* v. *Gay*, 169 U. S. 264, is also in point. That case was brought to restrain the collection of taxes assessed against cattle owned by non-residents of Oklahoma Territory, and being grazed in the Osage Nation. It was contended among other things that the taxation of cattle located for grazing purposes upon the reservation, under leases duly authorized by Act of Congress, was a violation of the rights of the Indians, and an invasion of the jurisdiction and control of the United States over them and their lands. As to this contention the court said (page 273):

"As to that portion of the argument which

claims that even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28, and *Maricopa & Phoenix Railroad* v. *Arizona*, 156 U. S. 347, in which it was held that the property of the railway company traversing Indian reservations are subject to taxation by the States and Territories in which such reservations are located.

"But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights in the property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a Tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed or could be changed by the legislature of Oklahoma at its pleasure, the value of the land for such purposes would fluctuate, or be destroyed altogether according to such conditions.

"But it is obvious that a tax upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431. There the State of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that State, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a

reference to the amount of tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw the burden on the carrying company, and thus in effect become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, where a tax imposed by the State of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two states was contended to be objectionable as constituting a burden upon interstate commerce but was held that the fact that the tax in question was to some extent affected by the amount of tolls received, and therefore might be supposed to increase the rate of tolls, and thus put a burthen on interstate commerce, it was too remote and incidental to make it a tax on the business transacted. *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185.

"The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock* v *Farmers' Loan & Trust Co.*, 157 U. S. 429, is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties.

"It is further contended that this tax law of the Territory of Oklahoma insofar as it affects the Indian reservations, is in conflict with the

constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interefere with, or impose a servitude upon a lawful commercial intercourse with the Indians over which Congress had absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of the unoccupied lands for grazing purposes.

"The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations may be conceded; but it is not perceived that local taxation by a state or territory, of property of others than Indians would be an interference with Congressional power. It was decided in *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28, that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the Territory of Idaho, was lawfully subject to territorial taxation, which might be enforced within the exterior boundary of the reservation by proper process. The question was similarly decided in *Maricopa & Phoenix Railroad* v. *Arizona Territory*, 156 U. S. 347.

"The taxes in question were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessee, and as we have heretofore said that as such a tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress."

In *Utah & Northern Railway Co.* v. *Fisher*, 116 U. S. 28, plaintiff incorporated under the laws of

Utah, and by Act of Congress of June 20, 1878, it was made a railway corporation not only of that territory but of Idaho and Montana also. It was granted a right of way through the Fort Hill Indian Reservation in Idaho and claimed exemption from taxation because its property was incorporated within the Indian Reservation, and that the treaty stipulation entered into by Congress with the Indians would be interfered with by the enforcement of the laws relating to taxation against the complainant. The court says in its opinion (p. 31):

> "To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indian. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by Act of Congress of July 3, 1882.

That agreement recites that the Utah & Northern Railroad Co. has applied for permission to construct a line of railway through the reservation, and that the Indians had agreed for the consideration thereafter mentioned to surrender to the United States their title to so much of the reservation and as might be necessary for legitimate and practical uses of the road. A strip of land and several parcels adjoining it, forming part of the reservation, were ceded to the United States for the consideration of $6000, to be used by the company and its successors or assigns as a right of way and roadbed, and for depots, stations and other structures. By an act of Congress confirmatory of the agreement, the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depot, stations and other structures, was granted to the company, and its successors and assigns, upon the payment to the United States of the $6000; and on the condition of paying any damages which the United States or the Indians, individually, or in their tribal capacity, might sustain by reason of the acts of the company or its agents or employees on account of the fires originating in the construction or operation of the road. By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was so far as necessary for the construction and working of the road and the construction and use of the buildings connected therewith, withdrawn from the reservation. The road and property thereby became subject to the laws of the territory relating to railroads as if the reservation had never existed. The very terms on

which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed."

In *Maricopa & Phoenix Railroad Co.* v. *Arizona Territory*, 156 U. S. 347, the syllabus is as follows:

"When Congress grants to a railway company organized under the laws of a territory, a right of way over an Indian reservation within the territory and the road is contructed entirely within the territory, that part of it wihin the reservation is subject to taxation by the territorial government."

In this case Congress by Act of January 17, 1887, granted to the railroad company a right of way through the Gila River reservation, which act provided that the railroad should be

"authorized, invested and empowered with the right to locate, construct, own, equip, operate, use and maintain a railway and telegraph and telephone line through the Indian reservation situated in the Territory of Arizona, known as the Gila River reservation, occupied by the Pima and Maricopa Indians.

"*Sec. 2.* A right of way one hundred feet in width through said Indian reservation is hereby granted to the said Maricopa & Phoenix Railway Co. and a strip two hundred feet in width, with a length of three thousand feet, in addition to said right of way, is granted for stations for each ten miles of road, no portion of which shall be sold or leased by the company; with the right to use such additional ground where there are

heavy cuts or fills as may be necessary for the construction and maintenance of the road, but not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill, * * * * and provided further that before any such lands shall be taken for the purposes aforesaid, the consent of the Indians thereto shall be obtained in a manner satisfactory to the President of the United States.

"It is insisted that the Territory is without authority under its organic act to extend its taxing power beyond its limits and over a reservation created by act of Congress, and that it has undertaken to do so, either directly, or by including the value of the property within the reservation in its general estimate of the amount for which the company ought to be assessed. This claim, we think, presents a question within our appellate jurisdiction. *Clayton* v. *Utah*, 132 U. S. 632. It is clear that such issues as involve the regularity of the tax, the sum of the penalties due, the extent of the lien given by the territorial law, etc., do not present any question of the exercise of authority under laws of the United States. *Linford* v *Ellison*, 155 U. S. 503. It is conceded that there was no treaty with the Indians for whose benefit the reservation was established, limiting the power of Congress to grant to the railroad the rights conveyed. The consent of Congress to the railroad's entering on the land and using it, as therein provided, was, then, a valid exercise of power. Its necessary effect was, to the extent of the grant and for the purposes thereof to withdraw the land from the operation of the prior act of reservation. And the immediate consequence of such

withdrawal, so far as it affected the property and rights withdrawn, was to re-establish the full sway and dominion of the territorial authority. *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28; *Harkness* v. *Hyde*, 98 U. S. 476.

"There is no force in the contention that, because the consent of the Indians, to be given in a manner satisfactory to the President, was a condition attached to the grant, and it does not appear by the record that such consent was given, therefore the rights admittedly enjoyed by the corporation are to be treated as if obtained without the Indians' consent.

"In the first place, as the company has taken the rights granted by the statute, the legal presumption of duty performed (*omnia rite*, etc.) requires us to assume that the consent was given in accordance with law. And again, the company having assumed and exercised rights which it could possess only by virtue of such consent, cannot be permitted to aver its own wrongdoing, trespassing, and violation of the statute in order to escape its just share of the burden of taxation.

"*It is wholly immaterial whether the rights vested in the corporation by the act of Congress were rights of ownership or merely those which result from the grant of an easement.* Whatever they were, they were taken out of the reservation by virtue of the grant, and came, to the extent of their withdrawal, under the jurisdiction of the territorial authority."

SECOND PROPOSITION.

Appellants' second proposition as found on page 21 of their brief, is as follows:

> "Were the proceedings to make and enforce the assessments such as to afford due process of law?
>
> "It took years for appellants to discover that an assessment against their premises was claimed, (98), and we think that it was void for uncertainty. A sufficient record of said inclusion proceedings was not made, and the record did not so identify the property sought to be charged as to constitute due process of law."

As before stated, here for the first time in this litigation is the question raised that the proceedings complained of did not constitute due process of law, and under the settled rule that only such questions as were raised in the court below will be considered here, except jurisdictional questions, we might dismiss this proposition without further comment.

But we cannot permit the statement in counsel's brief that it took years for appellants to discover that an assessment against their premises was claimed, to go unchallenged. Let us see what the record shows.

Paragraph No. 18 of the agreed statement of facts (Rec., 75) is as follows:

> "The complainants had full knowledge of the commencement and of the progress and completion of said work of improvement of and along said Oklahoma Avenue."

The trial court did not mention this objection in the opinion, and we think a brief examination of the record will dispose of the same against complainants' claim.

Finding No. 8 of the Agreed Statement of Facts (Rec., p. 72, is as follows:

> "8. Under and by virtue of the Act of the Legislature of the State of Oklahoma, mentioned in complainants' bill of complaint herein, it is provided, among other things, that,
>
> > 'If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisement and assessment, as herein provided'."

Finding No. 9 (Rec., p. 72):

> "9 That portion of complainants' right-of-way, railway yards and station grounds, abutting as aforesaid on said Oklahoma Avenue throughout the length thereof, from the point of intersection of the northeasterly boundary line of said right-of-way and station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the St Louis and San Francisco Railroad Company, and lying between said Oklahoma and Choctaw Avennes, had not been platted into lots and blocks, and the Mayor and Council of said City of Holdenville on June 29, 1910, by motion, adopted a map, a copy of which is hereto attached, marked 'Exhibit C.' That the minutes of said City Council with reference to said map are as follows:

'City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

'Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

'Upon a vote of "aye" by roll call the following vote was recorded. Those voting "aye," Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting "nay," none. Absent, Cornish, Nix.

'Motion declared carried and map adopted.'

"That on the original of said map the lines, showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered 33½, 44½, 52½, 68½, 78½, and the dollar signs followed by figures appearing therein, are in pencil and attached thereto are certain affidavits and endorsement, copies of which are attached to said exhibit; that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the City of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of subdividing said right-of-way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements."

Finding No. 10 (Rec., p. 73), and Findings Nos 12, 13, and 14 (Rec., p. 74), refer to the plat subdividing complainants' property and to the assessment against the same.

With reference to this map and the adoption thereof F. P. Rutherford, who was mayor of the City of Holdenville at that time, says (Rec., p. 100):

> "I was mayor of the City of Holdenville during the proceedings for the paving of street improvement district No. 1. I remember about the adoption of a map, subdividing the Rock Island right-of-way and station grounds into quarter blocks. I have that map with me. The map is identified and offered and admitted as 'Defendants' Exhibit A'; that is the map showing the platting of the railroad right-of-way and station grounds for assessment purposes. The map was adopted on June 29, 1910, and filed with the city clerk. It was filed the night it was adopted; was turned over to his possession and retained like all other documents. By filing I mean it was placed in his care and keeping. There was no file mark of record made on it that I know of. I did not do that personally. I was right in council meeting the night it was adopted and turned over with all other papers.
>
> (Witness' statement that it was filed with the clerk was ordered stricken by the trial judge. Remainder of his testimony as to details permitted to remain in the record.)
>
> "That map remained in the city clerk's office with the files during the proceedings until after the assessing ordinance was passed in

August. I don't know how much longer after that."

Again (Rec., p. 101), Rutherford testifies:

"I remember a representative of the Rock Island Railroad calling on me during the summer of 1910 during the progress of these proceedings on more than one occasion. The Rock Island representative would call in. Once he and the clerk came into my place of business to see about the assessing ordinance after the assessing ordinance had been passed. * * * The records of the City were open to his inspection. I remember a representative of the Rock Island receiving a copy of the assessment ordinance. I don't remember when it was any more but it was after the publication. The circumstance that I do remember is, that he and Mr. Draper, who was the city clerk, came into my place of business with a copy of the paper which carried this publication of the assessment ordinance and we were discussing it there in my store and he was rather criticising us for paying too much for the paving. He said he thought it ought to have been done cheaper than that, and that their Rock Island engineer said it could be done for a less price. I don't remember the figures. His conclusion was, we were paying too dearly for the paving. He had a copy of the paper containing the assessing ordinance that showed the amount of the assessment against the Rock Island Company."

To the same effect is the testimony of I. O. Draper, city clerk, who testifies (Rec., p. 104):

"I have seen the map which has been identified as 'Defendants' Exhibit A,' before. It

was adopted June 29, 1910, by the Mayor and Council. After its adoption it was filed in my office. It remained in my office as city clerk all the time from its adoption until it was given to Gilkerson & Leavy to be sent to Spitzer, Rorick & Company. That map was not in the transcript of proceedings that I sent to Spitzer, Rorick & Company. I don't remember just when he did send it to Spitzer, Rorick & Company. I don't remember just how long that map remained in my office. There was a map in the city engineer's office showing this paving district; it was a large map tacked up on the wall over his drafting table. I went over that map with a representative of the Rock Island Railroad. * * * Then I also went over it with an engineer that they sent there. He pretended to represent the Rock Island as one of the assistant attorneys. He was there to obtain information. I went over that map with those people and showed them this paving district several times. * * * We talked about the assessment, went over the records, went over to the print shop and got a paper. I went with this representative of the Rock Island; we got a copy of the paper at the print shop containing the assessing ordinance. We then went to Mr. Rutherford's store. We talked there, and Mr. Rutherford told both of us he thought the paving pretty high; that their engineer said it could be done cheaper. We had a copy of the assessing ordinance before us at that time."

It will be seen from this testimony, which is undisputed, that the Mayor and Council did by resolution adopt a map or plat dividing complainants' property into quarter block districts for the purpose of making these assessments.

It is to be noted that our statute (Sec. 724, Appendix) doesn't provide any method for subdividing this property for purpose of assessment. There is no law or ordinance requiring the adoption or filing or recording of any map or plat, and in the absence of any such requirement we think the subdivision of this property by any means which would make the property assessed sufficiently definite and certain to advise complainants as to what part of their property was assessed and the amount of the assessments would be all that could be required. The statute reads:

> "If any portion of the property abutting upon such improvement shall not be platted into lots and blocks the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisement and assessment as herein provided."

The blocks in the City of Holdenville on each side of the complainants' station grounds are 300 feet square; the right-of-way and station grounds are 300 feet wide. In adopting the plat and subdividing this property into quarter blocks as will be noticed from Exhibit "C" (Rec., between pages 78-79) the streets were considered as extending across the right-of-way and station grounds, and the right-of-way and station grounds of complainants abutting or adjacent to Oklahoma Avenue were subdivided into blocks designated as blocks 33½, 44½, 52½, 68½ and 78½, and assessments laid against the quar-

ter blocks abutting on that portion of Oklahoma Avenue improved.

Now, it is undisputed that the representative of the Rock Island Railway was shown these maps, the one adopted as well as the larger map on the wall of the city engineer's office; that he was furnished with a copy of the assessment ordinance very soon after its passage showing the amount assessed against complainants' property.

We think, therefore, it must be found as a fact that complainants knew at all times what part of their property was assessed and the amount of the assessments. In fact, the stipulation recites, that complainants had full knowledge of the proceedings relating to these assessments. If they did, they certainly were not injured by reason of the fact that the plat subdividing their property into quarter blocks adopted by the Council June 29, 1910, was at a later date and after the passage of the assessment ordinance, by inadvertence sent to the bond buyers with a transcript of the proceedings. Knowing, as they did, and as they were bound to know under the law of Oklahoma, that their property was subject to assessment, that the cost of these improvements would be taxed against the abutting property, and having knowledge through their representatives that the cost of these improvements was so assessed against their property, as well as against the property on the other side of Oklahoma Avenue, they can not now complain that the plat which was adopted

was not formally filed for record in the office of the register of deeds or some other public office, and recorded. There is no statute requiring any such record.

Even though it be conceded that complainants' property was not subdivided or designated with sufficient particularity of description to enable complainants to tell what portion of their property was assessed, it would not relieve complainants from their proper portion of the expense of this improvement, as in that event it would be the duty of the Mayor and Council to make a re-assessment containing proper description or designation of complainants' property. The Oklahoma statute (Sec. 728, Appendix), provides as follows:

> "SEC. 728. *Suits.*—No suit shall be sustained to set aside any such assessment, or to enjoin the Mayor and Council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payments as herein authorized, or contesting the valdity thereof on any ground or for any reason other than for the failure of the City Council to adopt and publish the preliminary resolution provided for in section two (723) in cases requiring such resolution and its publication and to give the notice of the hearing on the return of the appraisers provided for in section five (726) unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment: *Provided*, that in the event that any special assessment shall be found to be invalid or insuf-

> ficient in whole or in part for any reason whatsoever, the City Council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment (L. 1907-8, p. 176)."

That a re-assessment would be the proper method to correct such an error will be noted from the language of the Supreme Court of Oklahoma in *Oklahoma Railway Company* v. *Severns*, 170 Pac. 216-220, not yet officially reported (251 U. S. 104). Here the court says:

> "It is suggested by counsel that this court should determine by what description a tract of land in controversy should be assessed, that is, whether as a lot, quarter block or irregular tract. This question is not properly within the issues presented on the record. It does not appear to have been presented to the trial court. The contention made by plaintiff below was that the assessment was invalid for the reason that the property was not accurately described. The decree of the trial court sustains this contention and commands the city authorities to re-assess this private right-of-way by proper description and to take such steps as may be necessary to properly assess such property. The decree does not direct the commissioners as to the description."

This procedure was approved and the action of the trial court affirmed.

Under the proviso of Section 728, above quoted, it is the duty of the City Council in case any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, to make a re-assessment which shall have the same force and effect as an original assessment.

It is not claimed that the statute under which these assessments were levied does not afford due process of law.

It is claimed that the proceedings had and taken by the Mayor and Council of the City of Holdenville to make and enforce the assessments were not such as to afford due process of law .

(See Second Specification of error, Appellants' Brief, pages 12 and 21)

In other words, the objection as to want of due process of law goes to the manner and method of conducting these proceedings, and not to the statute itself.

We think it well settled that the constitutionality of the law is to be decided, not by what was done under it, not by the kind or character of the notice which in fact was given, not by the question whether or not the notice given was in compliance with the statute, but whether or not the notice provided for in the statute when given in compliance with the statute, violates any constitutional provision.

In other words, if the notice required and provided for by the statute is such notice as would fur-

nish due process of law, then the act is subject to no constitutional objection and this court cannot pass on the validity of these proceedings regardless of whether or not the notice given was sufficient or was in accordance with the requirements of the statute. *Davidson* v. *New Orleans*, 96 U. S. 97.

In the above case the court says:

"The objections raised in the state courts to the assessments were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And, although counsel for the plaintiff in error concede in the first sentence of their brief, that the only Federal question is, whether the judgment is not in violation of the provision of the Constitution which declares that 'no state shall deprive any person of life, liberty, or property, without due process of law,' the argument seems to suppose that this court can correct any other error which may be found in this record.

1. It is said that the legislature had no right to organize a private corporation to do the work, and, by statute, to fix the price at which the work should be done.

2. That the price so fixed is exorbitant.

3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasurer.

Can it be necessary to say, that if the work was one which the state had authority to do, and to pay for it by assessments on the property in-

terested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States."

Again on page 104, the court says:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

See also Dillon on Municipal Corporations, Vol. 4, Sec. 1365, 5th edition.

It will be noticed that the statute of Oklahoma under which these assessments were levied provides for the publication of two notices. Sec. 723 (See Appendix) provides that when the Mayor and Council deem it necessary to improve a street for which a special tax is to be levied, they shall by resolution declare such improvement to be necessary, and shall publish such resolution in six consecutive isses of a daily newspaper, or two consecutive issues of a weekly paper, and if the owners of more than one-half in area of the land liable to assessment to pay

for such improvement shall not within fifteen days after the last publication of the resolution file with the City Clerk their protest against the improvement, the Mayor and Council shall have power to proceed with the improvement.

Section 726 provides that after the appraisers have filed their report appraising the cost of improvement according to the benefits to the several lots and tracts of land in the improvement district, the Mayor and Council shall appoint a time for holding a session on some date to be fixed by them, to hear complaints or objections concerning the appraisement and apportionment as to any such lots or tracts of land, and notice of such session shall be published by the city clerk in five consecutive issues of a daily newspaper, or two issues of a weekly newspaper, and the time fixed for said hearing shall not be less than five, nor more than ten days from the last publication. The Mayor and Council at said session shall have the power to review and correct said appraisement and apportionment, and to raise or lower the same as to any lots or tracts of land, as they deem just, and shall by resolution confirm the same as so revised and corrected by them. Assessments shall be made in conformity with the appraisement as revised and corrected by the Council.

It will be noticed that after the report of the appraisers had been filed and the amounts which have been assessed in the judgment of the appraisers against the particular lots and tracts of land has

been determined, the statute says that a time an
place shall be appointed for a hearing "and notic
of such session shall be published by the city clerk.
The statute does not prescribe the form of notice, no
to whom, if any one, it may be directed, but specifi
ally provides for notice of the meeting to be pub
lished.

The form of notice published in the instant cas
is set forth in paragraph 15 of complainants' bil
(Rec., p. 14.)

Statutes of this character have been so ofte
held in objection in constitutional courts, that w
deem it sufficient to cite only a few of the decision
on this (see Dillon on Municipal Corporations, Ve
4, Sec. 1365, 5th Edition.)

Construction by said courts of the statute pro
vided for the imposition of taxes, giving to the tax
payers the right to appear before the assessin
board and to be heard was held to be conclusive b
the Federal Court. *Pittsburg C. C. & L. R. Co.*
Backous, 154 U. S. 421-426. Notice of publicatio
has been held to be sufficient in many cases.

—*French* v. *Barber Asphalt Pav. Co.*, 181 U. S
324;
Hagar v. *Reclamation Dist.*, 111 U. S. 70
Lent v. *Tillson*, 140 U. S. 316, 72 Calif. 40
14 Pac. 71;
Paulson v. *City of Portland*, 149 U. S. 30-4
Winona & St. P. Land Co. v. *Minnesota*, 1
U. S. 526-537;
Glidden v. *Harrington*, 189 U. S. 255;

Bellingham Bay & B. C. R. Co. v. *New Whatcom*, 172 U. S. 314-318;
Gilmore v. *Hentig*, 33 Kan. 156-170.

It is further held that personal notice to the property owner either by name or otherwise, is not necessary to constitute due process of law in levying assessments for local improvements, the proceeding being in the nature of a proceeding *in rem*.

—*Gilmore* v. *Hentig*, 33 Kans. 156;
Ballard v. *Hunter*, 204 U. S. 241;
Huling v. *Kaw Valley Ry.*, 130 U. S. 559;
C. C. C. & St. L. Ry. v. *Porter*, 210 U. S. 177;
Bouris v. *Pittsburg Plate Glass Co.*, 163 Ind. 599, 71 N. E. 249;
Alley v. *City of Muskogee*, (Okla.) 156 Pac. 315.

It is further held that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, provides due process of law.

—*McMillan* v. *Anderson*, 95 U. S. 37;
Lent v. *Tulson*, 140 U. S. 316;
Security Trust & S. V. Co. v. *City of Lexington*, 203 U. S. 223;
Page & Jones on Taxation by Assessment, Section 133.

This precise question was before the Supreme Court of Oklahoma in *Alley* v. *City of Muskogee*, 156 Pac. 315.

Discussing this question the Supreme Court of Oklahoma says:

"Plaintiff's legal rights, as the owner of lots abutting on one of the streets sought to be improved, were not unconstitutionally impaired for failure on the part of the mayor and city council to give him personal notice of the action of the city council when having under consideration the resolution of necessity or of its subsequent passage. Neither was it necessary to give said plaintiff and other owners of lots personal notice of the action of the board of appraisers, or of the hearing to be had thereon. The provisions of the statute authorizing notice by publication were sufficient. Construing the provision of the drainage statute, in regard to notice to property owners of the district (Section 3052, Comp. Laws 1909), it was said in *Davis* v. *Board of Commissioners*, 137 Pac. 114:

> 'The statute in the case at bar provides for service of notice by publication, but does not provide for personal service of such notice; and it is alleged in the petition that no personal notice was served. But the absence of provision for personal notice in the statute and the failure to give personal notice does not render the statute invalid and does not result in the proceeding denying to the property owners due process of law, for some other form of notice is provided and given, which fairly and reasonably apprises the property owners of the proceeding to assess their property and gives them an opportunity to be heard upon the merits of their objections to the assessment. Where the statute provides for notice by publication, that accomplishes the purpose, and it is not void as being in violation of the constitutional provision which

prohibits the taking of property without due process of law'—citing *Bellingham Bay & British Columbia R. Co.* v. *New Whatcom*, 172 U. S. 314 19 Sup. Ct. 205, 43 L. Ed. 460; *Wright* v. *Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; *Ballard* v. *Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461; *Ritter* v. *Drainage District No. 1*, 78 Ark. 580, 94 S. W. 711; Taxation by Assessment, Page & Jones, Sec. 121.

"In the earlier case of *Riley* v. *Carico*, 27 Okla. 33, 110 Pac. 738, it was held that notice by publication of an intention to form a drainage district consisting of two consecutive insertions in a newspaper of general circulation in the county in which the land was located, was sufficient to constitute due process of law, and was not repugnant to Section 24, Art. 2, of the Constitution. Such we understand to be the general rule in the giving of notices of special assessment proceedings. As said by Page & Jones, Taxation by Assessment, Sec. 760:

> 'The property owner has no constitutional right to personal service. If the statute provides for a service by publication of such a sort as fairly to amount to constructive service, and publication is had in compliance with the terms of the statute, the property owner receives sufficient notice and cannot attack the assessment proceedings on the ground of want of notice. If by the statute service by publication is specifically provided for, such service must ordinarily be made.'

"In neither the resolution or the notice, given by the City Clerk, is it necessary that the

property owners be named. *Lent* v. *Tillson*, 72 Cal. 404, 14 Pac. 71; *Williams* v. *Vicelich*, 121 Cal. 314, 53 Pac. 807; *City of Ottawa* v. *Macy* 20 Ill. 413; *Klein* v. *Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Huling* v. *Kaw Valley R. & I. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045.

"It is said in Page & Jones, Taxation by Assessment, Sec. 751:

> 'In the absence of a statute specifically requiring it, it is not necessary that a notice be given to the property owners by name. It may be addressed generally to the owners of land designated in a certain manner; as the owners of land abutting upon a specified part of the designated street; or to the property owners in sidewalk district No. 6.'

"Mr. Elliott, in his work on Roads and Streets (2nd ed.), Sec. 324, says:

> 'The form of the notice is not important unless the statute expressly prescribes a particular form, but the substance of the notice must, in all essential features, be such as the statute requires.'

"So, in *Wilson* v. *Inhabitants of the City of Trenton*, 53 N. J. Law 645, 23 Atl. 278, 279, 16 L. R. A. 200, the court says:

> 'The legislature may prescribe how such a notice may be given. The mode prescribed must be strictly followed and the proceedings must show the prescribed notice.'

"What notice should be given, and the manner in which it shall be given, are matters within legislative discretion, and the court cannot inquire as to the reason which prompted its ac-

tion, or do less than to require an observance of its mandates, unless contrary to the fundamental law."

Public Policy Under Oklahoma Statutes.

Now, what is the policy with reference to taxation, including levying of special assessments for local improvements, as expressed by the Constitution and laws of Oklahoma, and construed by the Supreme Court of this State? Our Constitution provides "the legislature shall pass no law exempting any property within this State from taxation, except as otherwise provided in this Constitution." (Section 50, Article 5.) Again, "the legislature may authorize County and municipal corporations to levy and collect assessments for local improvements upon property benefitted thereby, homesteads included, without regard to cash valuation." (Section 7, Article 10.) Also: "The rolling stock and other movable property belonging to any railroad, transportation, transmission, or other public service corporation in this State shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals; and the legislature shall pass no laws exempting any such property from execution and sale." (Section 7, Article 9.) Section 3868, Revised Laws of 1910 provides:—

"Every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work of labor upon or furnish any

materials, machinery, fixtures or other thing towards the equipment, or to facilitate the operation of any railroad, shall have a lien therefor upon the road-bed, buildings, equipment, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, beneficiaries under trusts or owners."

Section 3870 provides that said liens shall be mentioned in the judgment rendered for the claimant in an ordinary suit for the claim, which may be enforced by ordinary levy and sale under final or other processes in law or equity. Section 14, Chapter 45, Session Laws of Oklahoma, 1910, is as follows:

"Should any railroad company fail or refuse to pay the tax required by the provisions of this act within the time herein prescribed, interest shall be computed thereon at the rate of eighteen (18) per centum per annum from the date the same became due and the state shall have the first lien upon all the assets and property of such railroad company within this state."

Section 15 provides:

"Should any tax levied for state purposes under the provisions of this act become delinquent, the State Auditor may issue a tax warrant, directed to the sheriff of any county in this state, where any property of such delinquent railroad company may be found, and the sheriff receiving such tax warrant shall proceed to levy

the same upon the property of such delinquent railroad company in like manner as on execution. Should any tax levy for county, city, town, township or school district purposes, under the provisions of this act, become delinquent, the county treasurer of the county wherein such tax is delinquent, may issue a tax warrant directed to the sheriff of his county, who shall proceed to levy the same upon the property of such delinquent railroad company in like manner as on execution."

Judge Dillon, on Municipal Corporations, Section 1451, summarizes the decisions on this question as follows:

"SEC. 1451. *Special Assessments against Railroad Property.*—According to the view very generally had, land occupied and used by railroad companies for road-beds, depots, freight houses, and other corporate purposes, whether the company be owner of the fee or has only an easement or qualified right therein, is to be regarded as real estate, which may be subjected by the legislature to special assessment for the opening, paving, and grading of streets and for other local improvements in the same manner as the real property of private individuals. But this view is not uniformly accepted. Thus, in some jurisdictions it is held that a railroad is, in contemplation of law, a public highway; that it is therefore property devoted to public use, and comes within the general rule that a special assessment cannot be imposed upon public property, *unless the legislature has expressly authorized such an assessment to be made.* In other jurisdictions where special benefits are considered as absolutely essential to the power of the

legislature to authorize special assessments, th
decisions hold that land occupied as a roadbed o
right-of-way, (as distinguished from station
depots, depot grounds, freight houses, etc.,) b
ing permanently held and applied to use as
right of way, in contemplation of law, canno
possibly be benefitted by the improvement of
street adjoining or contiguous thereto, and tha
therefore, the essential requisites for a speci
assessment do not exist, and it cannot be im
posed. In other jurisdictions the courts hol
that benefit to the property for its present us
is the proper basis of assessment, and that suc
benefit must be established as a fact before th
assessment can be sustained."

The constitutional declaration that railways ar
highways and common carriers, does not exemp
land of a railroad used for depot and yard purpose
from a special tax for street improvements.

—*City of Nevada* v. *Eddy* (Mo.) 27 S. W. 47

Unless expressly exempt, the property of a rai
way company is usually held liable for special asses
ments.

—28 Cyc 1133.

Section 1 of our Paving Act being Section 72
Compiled Laws of 1909, provides for the enforcin
of lien against railroad, in District Court.

From Section 3 of the Paving Act of April 1
1908, (being Section 724, Compiled Laws of 1909),
appears that the legislature intended that lots ar
pieces or parcels of land fronting or abutting upo

any such improvement, should bear the burden of the expense thereof, to the center of the block where the abutting way is on the exterior of the block, and to the exterior where any improvements are made on any alley or other public way in the interior of the block.

It will therefore be seen that the doctrine which obtains in some states that it is against public policy to permit the right of way of a railway company to be segregated and sold for local assessments, does not obtain in this state, and that there is no public policy as indicated by Constitutional provisions and legislative enactments in the State of Oklahoma, denying the right of levying special assessments against the right of way of station grounds of railway companies.

See:

Oklahoma City v. *Shields*, 22 Okla. 298;
M., K. & T. Ry. Co. v. *City of Tulsa*, 45 Okla. 382, 145 Pac. 398;
Oklahoma Ry. Co. v. *Severns Paving Co.* (Okla.) 170 Pac. 216.

In *Oklahoma Railway Company* v. *Severns Paving Company, supra*, it is expressly held that a right of way of a railway company is subject to assessment for street improvements and that the proper method of assessing the same is to subdivide the same in quarter block districts where the same has not been platted into lots and blocks.

Paragraph 4 of the syllabus in that case is as follows:

> "A tract of land 40 feet in width along the center of the City Boulevard, and from which the general public are excluded by a six-inch curbing, the title to which the railway company holds by a voluntary conveyance purporting to convey the fee, is a 'lot, piece or parcel' of land fronting and abutting upon the boulevard, within the meaning of the statute (Compiled Laws 1909, Sec. 7241) and subject to assessment for the cost of paving said boulevard."

Paragraph 2 of the syllabus in said case:

> "Under Section 7, Article 9 of the Constitution, all real and personal property, or any part thereof, belonging to public service corporations, including street railways, is liable to execution and sale in the same manner as the property of individuals."

As to the enforcement of liens of mechanics, laborers, and artisans, see *K. C. S. Ry. Co.* v. *Tansey*, 41 Okla. 543, 139 Pac. 267.

Both the Constitution and statutes of Oklahoma confer such authority, and the public policy as declared by its Constitution and statutes has adopted the rule that no property of whatever character is exempt from special assessments for local improvements. The property owned by the City—by the County—and by the School Board—are all expressly made liable for the just proportion of the cost of local improvements, as well as the property of a railway company.

The authorities already cited and quoted from, including the Supreme Court of the United States, show that the question of taxation, the expense proposed, and method of collection, including local improvements, are matters of state, or local law or policy, not to be interfered with by the Federal Courts unless in violation of some Federal law.

We cannot define the policy of our state law on this point better than to quote from the opinion of our Supreme Court in *M. K. & T. Railway Co.* v. *City of Tulsa*, 45 Okla. 382-395, where our court quotes with approval from the opinion in *L. & M. Ry. Co.* v. *Barber Asphalt Paving Company*, 116 Ky. 856, 76 S. W. 1097, which case was later affirmed by the Supreme Court of the United States in 197 U. S. 430:

> "It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, that is its right of way. The railroad company has been in possession of the strip of land in question for 50 years. * * * It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. * * * Under the statute covering street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or

nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot within the meaning of the statute, and to thus appropriate it can not change its character''

THIRD PROPOSITION.

Complainants' Property Is Subject to Assessment Although Their Title Is Not in Fee but a Mere Easement for Railway Purposes.

Complainants object to these assessments on the grounds that the fee of the land assessed is in the Creek Nation and that complainants have a mere easement for railway purposes. Grant this to be true, it does not exempt the interest which complainants have in this property from liability for the payment of its proper portion of improving this street. This property is now a part of an interstate railway, a trunk line, we might say, being the only line of railway extending east and west through the State of Oklahoma and running from Memphis, Tennessee, through Arkansas, Oklahoma, and Texas to Tucumcari, New Mexico, and there connecting with the main line of the Rock Island extending from Chicago to the Pacific coast with connections at El Paso. It is inconceivable that any reverter of this land to the Creek Nation could ever occur. For all practical purposes complainants are the owners of this prop-

erty. They assert such title, and evidently expect to retain this property for railway purposes indefinitely as the Choctaw, Oklahoma & Gulf, as lessor, and Chicago, Rock Island & Pacific, as lessee, have entered into a contract for the operation of the railway over this property for a period of 999 years (Rec., p 87). Technically, the fee to this ground may be in the Creek Nation; it probably is; for all practical purposes and substantially, complainants are the absolute owners of this property for the purposes for which they hold possession.

These lands were expressly reserved from allotment under the treaties entered into by the Government with the Creek Nation, providing for the allotment of lands to members of the tribe. By section 2 of the Creek treaty approved March 1, 1901 (31 Stat. L. 861), it is provided:

> "All lands belonging to the Creek Tribe of Indians in the Indian Territory, except townsites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value," etc.

By the second treaty, or what is known as the Supplemental Creek Agreement, approved June 30, 1902, (32 Stat. L. 500), section 2 of the first treaty is amended to read as follows:

> "2. Section 2 of the agreement ratified by Act of Congress of March 1, 1901 (31 Stat L. 861), is amended and as so amended is re-enacted to read as follows: 'All lands belonging to the

> Creek Tribe of Indians in the Indian Territory, except townsites and lands reserved for Creek schools and churches, railroads, and town cemeteries, in accordance with the provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861) shall be appraised at not to exceed $6.50 per acre," etc.

Under the scheme of allotment no land could be selected that was not appraised, as the amount of land selected was based on its appraised value. It will be noted, therefore, that lands reserved for railroads were excluded from the scheme of allotment.

In *Maricopa & Phoenix Railroad Company* v. *Arizona Territory*, 156 U. S. 347-352, discussing the power of the territory to assess railroad property located on an Indian reservation for which Congress had granted a right-of-way, the court speaking through Mr. Justice WHITE says:

> "It is wholly immaterial whether the rights vested in the corporation by the Act of Congress were rights of ownership or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant and came to the extent of their withdrawal under the jurisdiction of the Territorial authority. The fact that Congress reserved the power to alter, amend or repeal the statute in no way affected the authority of the Territory over the rights granted, although the duration of that authority may depend on the exercise by Congress of the rights reserved."

In *Chicago and N. W. R. Co.* v. *Elmhurst*, 165 Ill. 148, 46 N. E. 437, it is held that an act recognizing the right to sell a portion of a railroad right of way to enforce a general tax, and providing that special assessments may be enforced in the same manner as general taxes, authorized a sale of a portion of the railroad right of way to satisfy a special assessment for paving. An easement of a right of way over a lot may, if benefitted, be assessed for the improvement of the street.

In *Rich* v. *City of Chicago*, 38 N. E. 255, it is held that the railroad right of way in a public street is "property" within the meaning of the statute authorizing the cost of local improvements to be assessed on contiguous property. We have heretofore quoted from pages 260 and 261 of this case.

In *Northern Pacific Railroad Co.* v. *Richland County*, 148 N. W. 545, L. R. A. 1915-A, 129, it is held specifically that a railroad right of way, if actually benefited, may be assessed for a local drain which is constructed under the provisions of the Dakota statute, irrespective of the fact whether the fee is in the railroad company or not.

It was contended in that case that special assessments for local improvements cannot be made against a right of way or easement of a railroad company and a sale could not be made to enforce the lien against a fragmentary portion of the roadbed of a railway or public service corporation. This conten-

tion of the railroad company was rejected and the assessment upheld.

Judge Dillon, in his work on Municipal Corporations, Sec. 1451, lays down the rule as follows:

> "According to the view generally had, land occupied and used by railroad companies for roadbeds, depots, freight houses and other corporate purposes, *whether the company be the owner of the fee or has only an easement or qualified right therein*, is to be regarded as real estate which may be subjected by the legislature to special assessment for the opening, paving and grading of streets and for other local improvements in the same manner as the real property of private individuals; but this view is not uniformly acknowledged, thus in some jurisdictions it is held that a railroad is, in contemplation of law, a public highway; that it is, therefore, property devoted to public use and comes within the general rule that a special assessment cannot be imposed upon public property unless *the legislature has expressly authorized such an assessment to be made*" (Italics ours.)

In *Louisville & Nashville Railroad Co.* v. *Barber Asphalt Company*, 197 U. S. 430, affirming the same case, 116 Ky. 856, 76 S. W. 1097, it was pleaded that the railroad's only interest in the lot was a right of way for its main roadbed, and that neither the right-of-way nor the lot did or could get any benefit from the improvement. The assessment was held valid. This affirmed the decision of the Supreme Court of

Kentucky in the same case, 116 Ky. 856, 76 S. W. 1097. The Kentucky Court in its opinion says:

> "It is not the intangible right to use it, but a strip of land which the railroad company appropriates for its use and upon which it builds its roadbed, that is its right of way.
>
> "The railroad company has been in possession of the strip of land in question for 50 years.
>
> " * * * If this strip of land was not occupied by the railroad company as a right of way it could not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of the street improvement. * * *
>
> " * * * Under the statute covering street improvements, a lot is any piece of land within the territory defined by the statute or the general council where the territory to be assessed is not bounded by principal streets. The use, or non-use, or the character of the use to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot within the meaning of the statute and to thus appropriate it can not change its character."

The above language, as before noted, is adopted and quoted with approval by the Supreme Court of Oklahoma in *M. K. & T. Ry. Co.* v. *City of Tulsa*, 45 Okla. 382-395, and must, therefore, we think be regarded as the settled law of Oklahoma.

To the same effect is *Heman Construction Company* v. *Wabash R. R. Co.*, 206 Mo. 172, 12 L. R. A. (N. S.) 112, 121 Am. State Rep. 649, 104 S. W. 67, 12 Ann. Cases 630.

Northern Pacific Railway Co. v. *City of Seattle*, (Wash.) 91 Pac. 244, 12 L. R. A. (N. S.) 121, is directly in point. It was there contended:

> "That appellant only occupied its land as a right of way, not owning the fee, and that its easement is not subject to special assessments. Overruling this contention and holding the right of way subject to special assessments for the improvement of the street the court said: 'Although the appellant may not hold the fee simple title, there is no reasonable or immediate probability that it will abandon the land, its use and easement is of but little value, if any. therefore, for all practical purposes the substantial owner. The fee simple subject to its use and easement is of but litle value, if any. Except for appellant's occupancy, no suggestions would be made that the land was not benefited by the improvement or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property can not be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement'."

In the above case the cases for and against the doctrine of special assessments against a right of way of railroad companies are cited and the con-

clusion reached that the later doctrine by the great weight of authority holds such property liable to these assessments unless such property is clearly exempted by statute from such burdens. In the closing paragraph of the opinion the court says:

> "Appellant further contends that even if it should be held that its right of way did receive some special benefit from the improvement, the assessment should not be made as no lien can be enforced therefor. It insists that there is no law in this state, nor any provision in the statute, for special assessments, which permits the lot and right of way of a public service corporation to be broken up or sold in fragments and the exercise of its franchise to be destroyed by piecemeal foreclosures and sales. The right and power to levy a special assessment upon the appellant's right of way is not in any way dependent upon the question as to whether a valid and enforceable lien can be created against its property. *Troy & L. R. Co.* v. *Kane*, 9 Hun. 506. We do not understand that either the collection of the assessment or the enforcement of any lien is now before us for consideration."

To the same effect is the closing paragraph of the opinion in *Heman Construction Company* v. *Wabash Railroad Company, supra*, where the court says:

> "As to the proposition urged against this lien that the roadbed or right of way of the defendant, or a part thereof, could not be sold under execution to satisfy any judgment which may be rendered in favor of plaintiff in this case, it is not necessary for us to express an opinion

at this time. What we do hold is that under the charter and ordinance the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced, but it is probable that counsel will be able if necessary to accomplish such result. As a general rule 'where there is a right there is a remedy' (2 Dill. Mun. Corp., 4th Ed., Sec. 822; *McIneny* v. *Reed*, 23 Ia. 410; *Lima* v. *Lima Cemetery Asso.*, 42 O. St. 128, 51 Am. Rep. 809; *N. Y.* v. *Coalgate*, 12 N. Y. 140), and this case we think forms no exception to that rule."

As regards complainants' title to the land assessed we beg to invite attention to the Act of Congress of August 24, 1894. 28 St. L. 502-504, section 5:

"Said corporation when organized as hereinbefore provided, shall have and possess perpetual succession."

This is the corporation which is authorized to succeed to all the rights, privileges and franchises of the Choctaw, Coal & Railway Company, and is, in fact, the charter of the Choctaw, Oklahoma & Gulf, one of the complainants herein. It will, therefore, be noted that this corporation, the Choctaw, Oklahoma & Gulf Railroad Company, complainant, is by its charter granted perpetual possession; it is granted a right of way by the Act of Congress over this land for railway purposes and, with the approval of Congress, enters into a lease of all its

rights, privileges and franchises to the Rock Island for a period of 999 years. To all intents and purposes complainants must, therefore, be held to be the owners of this property.

Complainants come into a court of equity seeking relief. What stronger case could be found for the application of the rule laid down by Pomeroy, 2nd Ed., section 378, approved by the Supreme Court of Oklahoma in *Collier* v. *Bartlett*, 175 Pac. 247-250:

> "Equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external forms to conceal the true purposes, objects and consequences of a transaction."

Applying this rule, complainants, exercising acts of ownership over this property, purporting to convey and receive right to use the same for a period of 999 years, should be held to be the owners of this property to the extent that their interest in the same should bear its proper share of the burden of improving the streets adjacent to their station grounds in our first class cities in Oklahoma.

Plaintiffs Are Estopped by Their Own Laches.

A court of equity will not grant plaintiffs relief because of plaintiffs' failure to protest at any time

against the proceedings complained of and because of plaintiffs' laches in bringing this suit.

The preliminary resolution upon which the paving proceedings were based were passed January 20, 1910 (Rec., p. 8). The assessment ordinance was passed August 25, 1910 (Rec., pp. 18-19). The bill of complaint in this case was filed November 1, 1912, more than two years after the passage of the assessment ordinance. Shortly after the passage of the assessment ordinance bonds were issued to the contractor in payment for the work and are now in the hands of innocent parties. No protest of any kind was made to the City Council during the progress of the proceedings leading up to the paving of this street. No question is better settled in this State, as well as by the Federal decisions, that plaintiffs have been guilty of such laches as will deprive them of any relief in a court of equity. The rule was first announced by the Supreme Court of Oklahoma in the *City of Perry* v. *Davis*, 18 Okla. 427-458, as follows:

> "The evidence discloses that the defendants in error stood by without objection or protest when the construction of the sewer adjacent to their property was in progress. Equity does not look with favor upon their silent and approving acquiescence of the performance of labor and expenditure of money enhancing the value of their properties when contrasted with their belligerent and warlike attitude exhibited for the first time after the full completion of the work. It was the plain duty of the defendants in error that when the publication of the ordi-

nance creating the sewer district, or when they discovered that labor and money was being expended in the actual construction of the sewer, to vigorously object and protest against it; then was an opportune time to test by injunction or other proceedings the legality of the various steps being taken; but no objection was made; no protest was filed and not a single murmur was heard in the sewer district from that November morning when the contractor and his workmen with their picks and shovels and spades went to improve the sanitary conditions of the district, in which all the defendants in error were resident property holders, to the evening when the entire work was completed according to contract, approved by the City Engineer and accepted by the City. It was not until after the completion of this work and when these defendants were called upon to pay their respective assessments for benefits received that it occurred to them that an injunction proceeding was a necessary and proper remedy to invoke. Under such circumstances, both the law and equity look with approval upon the payment of such assessments especially when made for a public work of this character."

This doctrine has been consistently followed by the Supreme Court of Oklahoma to the present time and is referred to and quoted with approval in the following opinions:

Kerker v. *Bocher*, 20 Okla. 729;
Paulsen v. *El Reno*, 22 Okla, 734;
Weaver v. *Chickasha*, 36 Okla. 226;
Bartlesville v. *Holm*, 40 Okla. 467-472;
Terry v. *Hinton*, 152 Pac. 851;

City of Chickasha v. *O'Brien*, 159 Pac. 282-283;
Morris v. *City of Lawton*, 148 Pac. 123;
Shultz v. *Ritterbusch*, 38 Okla. 478-484, 134 Pac. 961;
Jenkins v. *Oklahoma City*, 27 Okla. 230, 111 Pac. 941;
Lonsinger v. *Ponca City*, 27 Okla. 297, 112 Pac. 1006;
City of Muskogee v. *Rambo*, 40 Okla. 672, 138 Pac. 567;
City of Norman v. *Allen*, 147 Pac. 1002;
Sharum v. *City of Muskogee*, 43 Okla. 22-32, 141 Pac. 22;
City of Ardmore v. *Appollos*, 162 Pac. 211;
City of Coalgate v. *Gentillini*, 152 Pac. 95;
Wey v. *City of Hobart*, 168 Pac. 433.

In proper cases courts of equity, even from the consequences of unconstitutional acts or ordinances, will refuse relief.

A case in point is *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685. That was a suit brought by complainants against the City of Austin, *et al*, to restrain the City of Austin from levying and collecting a tax upon the property of the Austin Water, Light & Power Company to be expended in the construction of a rival system of water works. The Austin Water, Light & Power Company had a contract with the City of Austin to furnish water and light. Complainants were holders of the bonds of the water company. A controversy arose between the city and the water company and the city pro-

ceeded to construct its own water works and to levy and collect taxes for the payment of same, by virtue of an act of the legislature of Texas and of city ordinances passed by the City of Austin authorizing the construction of municipal water works. It was claimed by complainants that the act of the legislature and the city ordinances passed by the city were unlawful and void and unconstitutional as impairing the obligation of the contract between the City and the Water Company. Complainants did not file their suit until the City of Austin had commenced the construction of its municipal plant and expended considerable sums of money therefor and had voted and issued bonds to pay for same.

The lower court sustained a demurrer to the bill. Appeal was taken direct to the Supreme Court, where the case was affirmed. In the opinion by Mr. Justice WHITE the court says:

> "Conceding, without deciding, the legality and binding force of the contract as averred in the bill, and that the obligations which it created were materially impaired, not only by a law of the State of Texas, but also by the ordinances, all as alleged; conceding, moreover, without so deciding, that the Austin Water, Light and Power Company was the successor in law of the original corporations, and hence responsible for all their obligations and entitled to all their rights; and, further, conceding that the complainants as bondholders have the capacity to assert the impairment of the contract made by the City of Austin with the City Water Company, it yet be-

comes at the outset necessary to decide whether granting, *arguendo*, all these propositions, the complainants are entitled to the relief which they seek, that is to say, whether they can be heard to invoke the interposition of a court of equity. As a prerequisite to the solution of this question, it is necessary to determine precisely the remedy which it is the purpose of the bill to obtain in order to redress the wrongs which it alleged to exist. Whilst the prayer of the bill asks that the validity of the contract be recognized, and whilst it also prays that the legality of the commutation of taxation created by the city ordinance be decreed, these prayers are made but the foundation or premise for the real relief which the bill invokes; that is, the exercise of the power to enjoin in order thereby to perpetually restrain the City of Austin from completing the water works, by it commenced, and from levying on the property of the Austin Water, Light & Power Company any taxation to be used to complete the new water works. The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

"In *Speidel* v. *Henrici*, 120 U. S. 377, the court said, speaking through Mr. Justice GRAY:

> 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a

great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing." Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'

"In *Galliher* v. *Cadwell*, 145 U. S. 368-371, speaking through Mr. Justice BREWER, it was said:

'The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defence has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all.'

"In *Hammond* v. *Hopkins*, 143 U. S. 224-250, through Mr. Chief Justice FULLER, the court said:

'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.'

"In *Willard* v. *Woods*, 164 U. S. 502-524, the court said:

> 'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806-811; *Lansdale* v. *Smith*, 106 U. S. 391-394; *Badger* v *Badger*, 2 Wall. 87-95.'

"In *Lane & Badley Co.* v. *Locke*, 150 U. S. 193, and *Mackall* v. *Cassilear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary. *Whitney* v. *Fox*, 161 U. S. 637-647; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573-582; *Abraham* v. *Ordway*, 158 U. S. 416-423; *Ware* v. *Galveston City Co.*, 146 U. S. 102-116; *Foster* v. *Mansfield, Cold Water, etc., Railroad*, 146 U. S. 88-102; *Galliher* v. *Cadwell, supra*, where the earlier cases are fully reviewed; *Hoyt* v. *Latham*, 143 U. S. 553; *Hanner* v. *Moulton*, 138 U. S. 486-495; *Richards* v. *Mackall*, 124 U. S. 183-189.

"The reason upon which the rule is based is not alone the lapse of time during which the

neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Galliher* v. *Cadwell, supra,* 372, 'proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' The requirements of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity, will more readily consider laches. The equitable doctrine in this regard is somewhat analogous to the legal rule which holds that where one who has the title in fee to real estate, although he has not been compensated, 'remains inactive and permits them (a railway company) to go on and expend large

sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages.' *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11, and authorities there cited. As said in *Galliher* v. *Cadwell, supra*, 373: 'But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.'

"Do the facts in the case before us bring it within the rules of laches as expounded in the foregoing authorities? The rights of the water company, under its contract, were created long prior to the year 1890. Before that year the water works plant was constructed, and from it the inhabitants of the City of Austin were being supplied with water. The violation of the contract relied upon as impairing its obligations originated in 1890. The first step was the passage of an ordinance submitting to the voters of the city of Austin the proposition whether the bonded debt of the municipality should be increased by the issue of $1,400,000 of negotiable bonds, the proceeds arising from the sale of such bonds to be used in erecting the new water works. There was nothing clandestine in the conduct of the municipality, since its action was dependent on a municipal election. The holding of the municipal election followed, and, after it had taken place, occurred the passage of the ordinance, directing the issue of the new bonds, and providing that they were to be secured by

the water rates to be collected from the new water works which were to be constructed. From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which the bill alleges was necessarily to result from the action of the municipal authorities. During all this period it does not appear from the bill that the trustee representing the bondholders was ever called upon by them to take any steps whatever to protect their interest. It cannot be said that the bondholders were ignorant of the action and purposes, of the City of Austin, since the bill avers that, conscious of the fact that their rights were to be impaired by the action of the city, they repeatedly called upon the Austin Water, Light and Power Company to take action on the subject, but that that corporation refused so to do, and that the bondholders continued to object to the proposed action of the city without doing anything whatever to protect their legal rights. The bill alleges the issue by the municipal authorities of the series of bonds provided for, since it says, in referring to the tax levied upon the property of the Austin Water, Light and Power Company, that for the purpose 'of providing for the interest and sinking fund on the bonds of the said city of Austin, issued for said purpose,' (that is, the new water works), 'the said City of Austin has levied a tax * * * ' The exact amount of the new bonds which have been issued is not specifically set out in the bill, but it is inferable from the allegations, to which we have just referred, that the whole series have

been issued by the city, since the bill alleges that the taxation has been levied for the purpose of paying the bonds provided by the ordinance. Moreover, that either the whole or a large portion of the bonds have been issued is plainly deducible from other averments in the bill. The ordinance, which is an exhibit to the bill, provides that to pay for the work proposed the bonds should be discounted from time to time as required by the necessities of the situation, that the proceeds arising from their sale should be put to a special fund, and be warranted against by the proper city officer to pay for the work. And the bill avers that the city at great expense has nearly completed a costly dam across the Colorado River as a part of the work provided. The bill therefore presents a case where there has arisen during the existence of the delay a material change in the situation of the parties, and besides is one where rights of third parties have intervened. It cannot be said, under the case made by the bill, that the power of a court of equity can be exerted to forbid the finishing of the water works structure, which the bill alleges has been largely completel, without seriously impairing the rights of the bondholders under the ordinances in question. One of the methods of payment stipulated, as we have seen, for these bonds was the revenue to be derived from the new water works, and of course no such revenues can ever result if the water works are never to be finished. It is certain, then, that if the completion of the new water works be restrained by an injunction, that the interest of the new bondholders will be seriously affected, and that this result will be brought about by a decree of a court of equity rendered in the enforcement

of asserted rights of complainants, who, if they had taken timely action, could have adequately protected themselves from injury without resulting wrong to the rights of many other persons.

"It being clear under such circumstances that the complainants were not entitled to the relief which they sought, it of course follows that:

"The court below did not err in sustaining the demurrer and dismissing the bill for want of equity."

Penn Mutual Life v. *Austin, supra,* has been cited and quoted with approval many times, among other cases in *Thatcher* v. *Board of Supervisors of Polk County, Iowa,* 235 Fed. 728; *New York City* v. *Pine,* 185 U. S. 100; *Ward* v. *Sherman,* 192 U. S. 176.

It seems to us all the elements of estoppel on the ground of laches mentioned in *Penn Mutual Life* v. *Austin, supra,* will be found in this case. It is admitted here that the City of Holdenville pursued the statutory methods for the improvement of streets; that the contract was let, the improvement completed, the money expended, the bonds issued and sold to bona fide investors without a word of protest from complainants. Surely the rights of the parties to this suit have changed and the rights of innocent third persons have intervened.

The Railway Companies have secured the benefit of a street paved with asphalt adjacent to and parallel with the line of their station grounds, adjacent

to which improvement plaintiffs have one of their tracks, and adjacent to which have been located numerous industries on plaintiffs' right of way and station grounds. The City of Holdenville has issued its obligations in the form of bonds to pay for this improvement, and the defendants herein, Spitzer, Rorick & Company and Madison G. Baldwin, have purchased those bonds or some of them relying on the proceedings of the City of Holdenville and on the acquiescence of the complainants in those proceedings and in the assessment of their property to pay for the bonds. Plaintiffs admit they had knowledge and notice of all these proceedings.

It must be conceded that plaintiffs knew their property was assessed and that they knew what portion of their property was assessed to pay for these improvements, and the amount of those assessments, as that is shown by the undisputed testimony of F. P. Rutherford, Mayor of Holdenville at the time of the proceedings, and I. O. Draper, City Clerk. (Rec. pp. 100-106).

We think this case presents even stronger elements of estoppel than *Penn Mutual Life* v. *Austin, supra.* In the *Austin* case the result of the action of the City of Austin was not only to destroy the property of complainants but to assess what might be left of their property to pay for the new water works constructed by the city to take the place of the plant owned by complainants. In that case complainants undoubtedly suffered great injury but because of

their laches and delay in asserting their rights until the City of Austin had issued its obligations and expended large sums of money and the rights of third parties had intervened by the purchase of these bonds, the court held complainants could not recover where recovery would work an injury to the rights either of the City of Austin or of third persons whose interests had intervened.

In the case now under consideration, instead of an injury resulting to plaintiffs they are benefited so far as the record shows, and the court must presume it to be a fact, as it is not questioned, that complainants received benefits to their property at least to the extent of the assessments levied against the same for these improvements. They have not been diligent in asserting their claim that their property is not subject to these assessments. They have waited until the rights of the parties have changed, until they have received the benefit, and the contractor and the bondholders have expended the funds to pay for these improvements to complainants' benefit, and must not now be heard to say that they shall not pay for the improvements constructed.

Truly, the Supreme Court says,

> "nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."

We respectfully submit that the decree rendered in the Circuit Court of Appeals should be affirmed.

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Appendix.

NOTE: Below we give the sections of the paving law of Oklahoma in force at the time the proceedings were had in the instant case, being the act approved April 17, 1908, found in Session Laws of 1907-8, p. 166, *et seq.*, and being Sections 722 to 728, inclusive, of Compiled Laws of Oklahoma, 1909.]

SEC. 722. *Paving — Grade — Material — Street and Steam Railways.* The mayor and council of cities of the first class are hereby empowered to establish and change the grade of any streets, avenues, lanes, alleys and other public places in such cities, and to permanently improve the same by paving, macadamizing, curbing, guttering and draining the same, including the installing of all manholes, catch basins and necessary drainage pipes whenever, in their judgment, the public convenience may require such improvements, subject only to the limitations prescribed in this act; *provided*, that any change of any grade established by the city shall not be made without making due compensation to the owners of abutting property for any damage thereby caused to the permanent improvements erected thereon, with reference to the previously established grade; *provided, however*, that the failure to make such compensation shall in no wise invalidate the assessments on the property chargeable therewith, as hereinafter provided; *provided further*, that all the street

railway companies operating within the said city shall be required to pave, macadamize, curb, gutter or drain the portion of their track situated in such streets and two feet on each side thereof, as the remainder of said streets may be so improved, or such other material as the city may require, and when there are two or more tracks of any railway or street railway company upon one street, then said company shall be required to gravel, pave or macadamize as the city may require, also the space between said tracks; *provided further*, that when a steam railway company shall occupy any portion of a street with its tracks running in the general direction of such street, either on or adjacent thereto, that the said steam railway company shall improve the space between its said tracks and two feet on either side thereof, in the same manner that said street shall be improved, and the same as is hereby required of street railway companies, and in case any steam railroad or street railway company shall occupy an alley with its track or tracks, such company shall be required to improve, gutter, drain, grade or pave such alley in the manner that may be required by the ordinance of such city, and where any railroad company shall cross with any street that is being or has been paved, the city council may require such railroad company to pave so much of said street as may be occupied by its track or tracks and two feet on each side, and when more than one track crosses such street within a distance of one hundred feet, said railroad company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same

manner as the city may be improving or has improved the other portion of said street, and that the city may require, in addition to the improvement of such streets as herein required, that said railroad company shall construct sidewalks with such material as the city may by ordinance require, upon either or both sides of such street, and that such street car company or railroad company shall maintain such improvements, keeping the same in repair at its own expense, using for such purpose the same material as is used for the original paving, graveling or macadamizing, or sidewalks, or such other material as the city may order, and if the owners of said steam railway or street railway shall fail or refuse to comply with the order of the city to make such improvements by paving, graveling, macadamizing or sidewalking, as the city may direct, or to repair such paving, graveling macadamizing or sidewalking, such work may be done by the city and the cost and expense thereof shall be charged against steam railway or street railway company, and may be collected in the District Court in the county in which such improvements have been made, by action at law, in the name of the city against such steam railway or street railway company, and in any action at law where pleadings are required, it shall be sufficient to declare generally for work or labor done, or material furnished, on the particular street, avenue, alley or highway so improved; in addition to the remedy above provided for the collection of costs and expense of the paving, graveling, macadamizing or sidewalking adjacent to steam and street railway

tracks as herein above provided, the city, or any one authorized by it to do the work, shall be entitled to a lien upon the property of said steam or street railway company, and such lien shall exist for the full amount of said cost and expense against the property of said steam or street railway company adjacent or contiguous to which said improvement or improvements shall be so made and said lien may be enforced against the property of said steam railway or street railway company by action in the District Court for the county in which said improvements have been made, and in any action in equity it shall be sufficient to declare generally that said lien exists for the amount of the cost and expense of the work and labor done or material furnished, on the particular street, avenue, alley or highway so improved. (L. 1907-8, p. 166.)

SEC. 723. *Improvements and Procedure.* When the mayor and council shall deem it necessary to grade, pave, macadamize, gutter, curb, drain or otherwise improve any street, avenue, alley or lane, or any part thereof, within the limits of the city for which a special tax is to be levied as herein provided, said mayor and council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published in six consecutive issues of a daily newspaper or two consecutive issues of a weekly newspaper, published and having general circulation within such city; and if the owners of more than one-half in area of the land liable to assessment to pay for such improvement of any such highway shall not, within fifteen (15)

days after the last publication of such resolution, file with the clerk of said city their protest in writing against such improvement, then the mayor and council shall have power to cause such improvement to be made and to contract therefor and to levy assessments as herein provided, and any number of streets, avenues, lanes, alleys, or other public places or parts thereof to be so improved may be included in one resolution, but such protest or objection shall be made as to each street or other highway separately, *provided*, that if the owners of more than one-half in area of the land liable to assessment for any such improvement shall petition the mayor and council for such improvement of any street or part of street, alley, lane, or avenue not less than one block in length, describing in such petition the character of the improvement desired, the width of the same and the materials preferred by the petitioners for such improvement, it shall thereupon be the duty of the mayor and council to promptly cause the said improvement to be made in accordance with the prayer of said petition, and in such case the resolution hereinbefore mentioned shall not be required; *provided further*, that any property which shall be owned by the city or county in which such is located, or any board of education or school district, shall be treated and considered the same as the property of other owners within the meaning of the provisions of this act, and the property of any city, county, school district and board of education within the district to be assessed, shall be liable and assessed for its proper share of the costs of such improvements, in accord-

ance with the provisions of this act. (L. 1907-8, p. 168.)

An Act to Amend Section 3 of Chapter 10 of Session Laws, 1907-8, of "An Act Entitled, 'An Act to Provide for the Improvement of Streets and Other Public Places Within Cities of First Class, by Grading, Paving, Macadamizing, Curbing, Guttering and Draining the Same,' and Declaring an Emergency. Approved April 17, 1908."

SEC 724. *Property Assessed—Crossings—Property Not Platted.* The lots, pieces or parcels of land fronting and abutting upon any such improvement shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided; *provided*, that in case of an alley extending through a block which shall not be in the center of the block, then assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or

tracts are to be assessed for any such improvements, any part of the cost of such improvements in excess of the benefits accruing to such lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; *provided further,* that the mayor and council, may in their discretion provide for the payment of the cost of improving street intersections and alley crossings, which cost shall be provided for and paid by said city and for the purpose of paying such expenses a special and separate levy shall be made and entered against all the property of the said city at the next annual tax levy, after such estimate is made which said expense shall embrace the pro rata part of the expense of advertising and making profiles and specifications together with the expense charged by the city engineer, superintendents and in all other respects, but the city may at its option, arrange for its payment in three equal annual payments, and the board of appraisers appointed for ascertaining and assessing such costs shall apportion in their assessment a portion of such expense as may be charged to the street or steam railway companies, or either of them, and to the city. If any portion of the property abutting upon such improvement shall not be platted into lots and blocks the mayor and council shall include such property in proper quarter block districts for the purpose of appraisement and assessment, as herein provided. *Provided,* that whenever the petition provided for in section 2 of this act (723) is presented, or when the mayor and city council shall have determined to pave or improve any street, avenue, lane, alley, or other

public place, and shall have passed the resolution provided for in section 2 of this act (723), that the mayor and council shall then have the power to enact all ordinances and to establish all such rules and regulations as may be necessary to require the owners of all property subject to assessment to pay the cost of such improvement, to cause to be put in and constructed all water, gas, or sewer pipe connections, to connect with any existing water, gas or sewer pipes in and underneath the streets, avenues, lanes and alleys and other public places where such public improvements are to be made, and all costs and expenses for making such connections shall be taxed against such property and shall be included and made a part of the general assessment to cover the cost of such improvement. (L. 1909, H. B. 401.)

SEC. 725. *Resolution—Plans—Contractor's Bond—Advertisement—Publication—Award.* After the expiration of the time for objection or protest on the part of property owners, if no sufficient protest be filed, or on receipt of a petition for such improvement signed by the owners of more than one-half in area of the land to be assessed, if such petition shall be found to be in proper form and properly executed, the mayor and council shall adopt a resolution reciting that no such protest has been filed, or the filing of such petition, as the case may be, and expressing the determination of the council to proceed with the improvement, defining the extent, character and width of the improvement, stating the material to be used and the manner of construction and such other matters as shall be necessary, to instruct the

engineer in the performance of his duties in preparing for such improvement, the necessary plans, plats, profiles, specifications and estimates. Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and the performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

Said resolution shall also direct the city clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. The notice for such proposals shall state the street, streets or other public places to be improved, the kinds of improvements proposed, what, if any, bond or bonds will be required to be executed by the contractor as aforesaid and shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by the mayor and council.

Said notice shall be published in ten consecutive issues of a daily newspaper or two consecutive issues of a weekly newspaper published and of general circulation in said city.

At the time and place specified in such notice, the mayor and council shall examine all bids received and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected and perform all the conditions imposed by the mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of cost submitted by the engineer with the plans and specifications, and the mayor and council shall have the right to reject any and all bids and to re-advertise for other bids when any such bids are not in their judgment, satisfactory (L. 1907-8, p. 170).

726. *Appraisers—Reports—Complaints—Assessments—Bonds.* As soon as the contract is let and the cost of such improvement, which shall also include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained the mayor and council, shall, by resolution, appoint a board of appraisers, to appraise and apportion the benefits to the several lots and tracts of land which shall be designated in said resolution, which board of appraisers shall consist of three disinterested freeholders of the city, not owners of any property to be assessed, and it shall be the duty of said appraisers, within five days after being notified of their ap-

pointment to proceed to appraise and apportion the benefits, to such lots and tracts of land as shall have been designated by the council, after having taken and subscribed an oath to make a true and impartial appraisement and apportionment, and a written report of such appraisement and apportionment shall be returned and filed with the city clerk within ten days from the date of the appointment of such appraisers. Such appraisers shall each be paid not to exceed five dollars for each day while actually employed in such service. *Provided*, that, the acts of a majority of said appraisers, shall have like force and effect as the act of all. When said report shall have been so returned, the mayor and council shall appoint a time for holding a session on some day to be fixed by them to hear any complaints or objections that may be made concerning the appraisement and apportionment as to any of such lots or tracts of land, and notice of such session shall be published by the city clerk in five successive issues of a daily newspaper or two issues of a weekly newspaper published and of general circulation in said city and the time fixed for said hearing shall be not less than five, nor more than ten days from the last publication. The mayor and council at said session shall have the power to review, and correct said appraisement and apportionment and to raise or lower the same, as to any lots or tracts of land as they shall deem just, and shall, by resolution, confirm the same as so revised and corrected by them. Assessments in conformity to said appraisement and apportionment as corrected and confirmed by the council shall be payable in ten

equal annual installments, and shall bear interest at the rate of seven per cent per annum until paid, payable in each year at such time as the several installments of the assessments are made payable each year. The mayor and council shall by ordinance levy assessments in accordance with said appraisement and apportionment as so confirmed against the several lots and tracts of land liable therefor.

The first installment of said assessments, together with interest to that date upon the whole shall be due and payable on the first day of September next succeeding the passage of said ordinance and one installment, with the yearly interest upon the amounts remaining unpaid, shall be payable on the first day of September, in each succeeding year until all shall be paid, *provided, however,* that in case said assessment and interest is not paid when due, the assessment so matured and unpaid shall bear interest at the rate of eighteen per centum per annum, until paid, *provided, further,* that if such assessing ordinance shall be passed after the first day of August in any year, the first installment of such assessment and interest shall be due and payable on September first of the following year. Said ordinance shall also provide that the owners of the property so assessed shall have the privilege of paying the amounts of their respective assessments within thirty days from the date of the passage of said ordinance. The owners of property so assessed shall be allowed to make payment of their respective assessments without interest within said period of thirty days to the city clerk and thereby relieve their prop-

erty from the lien of said assessment, which money so paid to the city clerk shall be by him disbursed pro rata between the contractor and the city in proportion to the respective interests.

Such special assessments and each installment thereof, and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed, from the dates of the ordinances levying the same co-equal with the lien of other taxes, and prior and superior to all other liens against such lots or tracts and such lien shall continue until such assessment and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty.

The mayor and council, after the expiration of said thirty days, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date fifteen days after the passage of the ordinance levying the assessments and of such denominations as the mayor and council shall determine, which bond or bonds, shall in no event become a liability of the city issuing the same.

One-tenth in amount of any such series of bonds, with the interest upon the whole series to that date, shall be payable on the fifteenth day of September next succeeding the maturity of the first installment of the assessments and interest and one-tenth thereof with the yearly interest upon the whole amount remaining unpaid, shall be payable on the fifteenth day of September in each succeeding year until all shall be paid. Such bonds shall bear interest at a

rate not exceeding six per cent per annum from their date until maturity, payable annually and ten per cent from maturity until paid, and shall be designated as "Street Improvement Bonds," and shall on the face thereof recite the street or streets, part of street or streets or other public places, for the improvement of which they have been issued, and that they are payable solely from assessments which have been levied upon the lots and tracts of land benefited by said improvement under authority of this act. Said bonds shall be signed by the mayor and attested by the city clerk of said city and shall have the impression of the corporate seal of such city thereon, and shall have interest coupons attached, and all bonds issued by authority of this act shall be payable at such place either within or without the State of Oklahoma as shall be designated by the council.

Said bonds shall be sold at not less than par, and the proceeds thereof applied to the payment of the contract price and other expenses, by the mayor and council, or such bonds in the amount that shall be necessary for that purpose may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract, and the portion thereof which shall be necessary to pay other expenses incident to and incurred in providing for said improvement shall be sold or otherwise disposed of as the mayor and council shall direct. Said bonds shall be registered by the city clerk of the city issuing them in a book to be provided for that purpose and certificates of registration by said city clerk

shall be endorsed upon each of said bonds. (L. 1907-S, p. 172.)

SEC. 727. *Collection, Payment and Notice of Assessment — Delinquents.* The assessments provided for and levied under the provisions of this act shall be payable by the persons owing the same as the several installments become due, together with the interest thereon, to the city clerk of such city, who shall give proper receipts for such payments. The city clerk shall be required to execute a good and sufficient bond with sureties, and in an amount to be approved by the mayor and council, payable to the city conditioned for the faithful performance of the duties enjoined upon him by this act as collector of said assessments.

It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily, the amounts of such assessments collected by him and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose.

It shall be the duty of such city clerk, not less than thirty days and not more than forty days, before maturity of any installment of such assessments to publish in two successive issues of a daily paper, or in one issue of a weekly newspaper, published and of general circulation in said city, a notice advising the owner of the property affected by such assessment of the date when such installment and

interest will be due and designating the street, streets or other public places for the improvements of which such assessments have been levied and that unless the same shall be promptly paid shall bear interest at the rate of eighteen per cent per annum thereafter until paid, and proceedings taken according to law to collect said installment and interest; and it shall be the duty of the city clerk promptly after the date of maturity of any such installment of assessment and interest and on or before the fifteenth day of September in each year to certify said installment and interest then due to the county treasurer of the county in which said city is located, which installment of assessment and interest shall be by said county treasurer placed upon the delinquent tax list of said county for the current year and collected as other delinquent taxes are collected and thereupon pay to the city treasurer for disbursement in accordance with the provisions of this act; *provided*, that failure of the city clerk to publish said notice of the maturity of any installment of said assessment and interest shall in no wise affect the validity of the assessment and interest (L. 1907-8, p. 175).

SEC. 728. *Suits.* No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payments as herein authorized, or contesting the validity thereof on any ground or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two

(723) in cases requiring such resolution and its publication and to give the notice of the hearing on the return of the appraisers provided for in section five (726) unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; *provided*, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment. (L. 1907-8, p. 176.)